Supreme Court, U. S.
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JUN 11 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

(VOLUME I—Pages 1a-190a)

In the Supreme Court of the United States

Oct. [redacted] Term, 1979

No. 78-1318

HELEN B. O'BANNON, SECRETARY OF PUBLIC WELFARE,

Petitioner

vs.

TOWN COURT NURSING CENTER, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 882-0401

Petition for Certiorari Filed February 26, 1979

Certiorari Granted April 16, 1979

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VOLUME I

APPENDIX

I.

DOCKET ENTRIES

Plaintiffs

TOWN COURT NURSING CENTER, INC.

and

COOPER, EMMA; CRAWFORD, MARY; KEMP, HAZEL; PHILLIPS, ARNOLD L.; TADDEI, DELPHINE; TRUITT, NANCY, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.

v.

Defendants

BEAL, FRANK S., individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania,

and

CALIFANO, JOSEPH A., JR., individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare

Cause

Civil Rights

Attorneys

William F. Coyle, 1430 Land Title Bldg., Phila., Pa. 19110, for: All plffs. EXCEPT Town Court Nursing Center, Inc.

Nathan L. Posner, Jeffrey D. Albert, Fox, Rothschild, O'Brien and Frankel, 1401 Walnut St., 10th Flr., Phila., Pa. 19102, for: Town Court Nursing Center, Inc.

Robert deLuca, Asst. United States Attorney.

M. Faith Angell, Deputy Attorney General, 206 State Office Bldg., Phila., Pa. 19130, for: Frank S. Beal.

Proceedings

Date Nr.

1977

1 July—20 Complaint filed.

—July—20 Summons Exit. (2 sets).

2 July—20 Plffs' motions for temporary restraining order and preliminary injunction, memorandum of law in support and affidavit, filed.

—July—21 The sum of $100.00 deposited into Registry of Court.

3 July—21 Motion and Order appointing James Bray, Jr. to serve the complaint and summons upon the defts., filed.

4 July—21 Order that defts, agents, et al., are enjoined and restrained until 7/26/77 from discontinuing or withholding payments to plff. Town Court Nursing Center, Inc. for the care of Medicare and Medicaid beneficiaries; plffs shall file with this Court security to the Clerk of Court in the amount of $100, motion for preliminary injunction heard on 7/26/77 at 2:00 p.m. in courtroom 15A, etc., filed. JF 7/22/77 entered and copies mailed.

5 July—27 Entry of appearance of William F. Coyle on behalf of plffs and withdrawal of appearance of Jeffrey B. Albert on behalf of plffs., filed.

6 July—27 Hearing re: Preliminary injunction, 7/26/77, filed.

7 July—27 Hearing re: preliminary injunction, 7/27/77, T.R.O. remains in effect pending final administrative review, filed.

8 July—27 Defts' brief in opposition to plff's motion for preliminary injunction and in support of deft's motion to dismiss and certification, filed.

9 July—29 Summons returned "with affidavit of Patricia S. Jantorna re: served Dept. of HEW—Deputy General Counsel and Joseph A. Califano, Jr. by cert. mail on 7/25/77, filed.

10 July—29 Summons Returned "with affidavit of James Bray, Jr. re: served U.S. Attorney on 7/22/77", filed.

11 July—29 Acceptance of Service of James R. Adams for Frank S. Beal, of summons, complaint, etc., filed.

12 August—3 Summons Returned "with affidavit of Patricia C. Jantorna re: served Attorney General by cert. mail on 7/28/77", filed.

13 August—19 Deft. Frank S. Beal's motion to dismiss, memorandum of law in support, certificate of service, and notice, filed.

14 August—29 Deft. Joseph Califano, Jr.'s motion to dismiss, memorandum of law, and certificate of service, filed.

15 September—2 Plaintiffs' Memorandum of Law in Opposition to defendants' motion to dismiss, filed.

16 September—12 Plfts' motion for extension & renewal of preliminary injunction, and memorandum of law, filed.

17 September—15 Transcript of preliminary hearing on July 26, 27, 1977, filed.

18 September—15 Order that plfts' motion for extending the duration of preliminary injunction, Denied and the preliminary injunction entered is Dissolved: provided, however, that defts. shall not withhold payments from services actually provided to patients, filed. JPF, J. 9/16/77 Entered and copies mailed.

19 September—15 Order, that this Court's Order dissolving preliminary injunction entered is Stayed for a period of 10 days from date hereof, to permit pltfs to file notice of appeal, etc., plft's. request for a longer stay from this court is Denied, filed. JPF 9/16/77 enter and copies mailed.

20 September—15 Hearing re: plfts'. motion to extend preliminary injunction is Denied Without Prejudice, filed.

21 September—15 Brief of Federal deft. in opposition to plft's. motion to extend preliminary injunction, and Certification, filed.

22 September—19 Transcript of trial testimony held 9/15/77, filed.

23 September—16 Notice of appeal of Emma Cooper, et al. received 9/16/77 at 4 PM, filed. (Appeal 77-2222) 9/20/77 entered & copies to Nathan L. Posner, Robert deLuca, M. Faith Angell.

24 September—16 Copy of Clerk's notice to U.S. Court of Appeals, filed.

—September—16 Bond for costs on Appeal in the sum of $250 with Fidelity & Deposit Co. of Maryland as surety, filed.

25 September—16 Notice of Appeal of Town Court Nursing Center, Inc., received 9/16 at 4:05 PM, filed. 9/20/77 entered & copies to William F. Coyle, Esq., Robert deLuca, M. Faith Angell.

26 September—16 Copy of Clerk's notice to U.S. Court of Appeals, filed. (Appeal No. 77-222).

—September—16 Bond for costs on Appeal in the sum of $250 with Fidelity & Deposit Co. of Maryland as surety, filed.

27 September—26 Certified copy of Order U.S. Court of Appeals Granting appellants' motion for injunction pending appeal, etc., filed.

—September—26 Sum of $100.00 deposited into Registry of Court.

—October—11 Original record transmitted to U.S.-C.A. (except paper No. 4)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

Class Action

TOWN COURT NURSING CENTER, INC.

and

EMMA COOPER

and

MARY CRAWFORD

and

HAZEL KEMP

and

ARNOLD L. PHILLIPS

and

DELPHINE TADDEI

and

NANCY TRUITT, individually and on behalf of the class of patients eligible for Pennsylvania Medical

Assistance Program benefits at Town Court Nursing Center, Inc.,

Plaintiffs,

v.

FRANK S. BEAL, individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania,

and

JOSEPH A. CALIFANO, JR., individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare,

Defendants.

II.

VERIFIED COMPLAINT

---

1. Plaintiff Town Court Nursing Center, Inc. (hereinafter referred to as "Town Court") is a corporation organized under the laws of the Commonwealth of Pennsylvania with his offices at 1526 Lombard Street, Philadelphia, Pennsylvania, where it operates Town Court Nursing Center, a skilled care facility.

2. Plaintiffs Emma Cooper, Mary Crawford, Hazel Kemp, Arnold L. Phillips, Delphine Teddei and Nancy Truitt are individuals who have been patients at and residents of Town Court Nursing Center since at least February 28, 1977 and who are qualified as medically indigent under the Pennsylvania Medical Assistance Program, 62 P.S. §441.1 *et seq.* (more commonly known as "Medicaid").

3. Defendant Frank S. Beal is Secretary of Public Welfare of the Commonwealth of Pennsylvania. He is sued both in his individual and his official capacities.

4. Defendant Joseph A. Califano, Jr. is Secretary of the United States Department of Health, Education and Welfare. He is sued both in his individual and his official capacities.

5. Jurisdiction is founded upon 28 U.S.C. §§1331 (a) and 1361. The amount in controversy exceeds $10,000, exclusive of interest and costs.

COUNT I

(Town Court v. Beal)

6. On or about May 20, 1977 defendant Beal, through his deputy, Glenn Johnson, Director, Bureau of Medical Assistance, Department of Public Welfare, notified Town Court that, effective June 18, 1977, it would "no longer receive payments under the Medical Assistance Program for skilled nursing care or for services provided to Medical Assistance patients."

7. Therefore, effective June 18, 1977, defendant Beal terminated the Skilled Nursing Home Care Agreement entered into by and between the Pennsylvania Department of Public Welfare and Town Court on September 4, 1975 as extended.

8. Pursuant to Federal regulation, Town Court continued to be eligible to receive Medicaid payments until July 18, 1977 when, despite denial of all charges and written appeal and a demand for a hearing, eligibility for such payments ceased.

9. The aforesaid action by defendant Beal violates Town Court's constitutional right to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

10. Approximately 180 of the 198 patients at Town Court are qualified under the Medicaid program which program pays their charges for use of the facilities at Town Court.

11. In the absence of reimbursement for the services provided these patients, Town Court will be unable to maintain operations and will be forced to close to avert an overwhelming and irreparable financial loss to its owner, Geriatric and Medical Services, Inc., a public company.

12. There is no adequate remedy at law.

COUNT II

(Emma Cooper, et al. v. Beal)

13. Paragraphs 1 through 8, inclusive, and 11 and 12 above, are incorporated by reference as though set forth herein in full.

14. The individual plaintiffs are in chronic need of the services provided by Town Court which services are not presently available at other skilled care facilities in Philadelphia.

15. The following sets forth the most recent date of admission to Town Court for each of the named individual plaintiffs:

Emma Cooper—July 16, 1976
Mary Crawford—September 23, 1975
Hazel Kemp—October 18, 1973

Arnold L. Phillips—October 18, 1973
Delphine Taddei—October 16, 1976
Nancy Truitt—February 28, 1977

CLASS ACTION ALLEGATIONS

16. The individual plaintiffs are six of the one hundred eighty patients at Town Court eligible to receive Medical Assistance program benefits.

17. Each of these patients will suffer and is suffering a loss of benefits of the aforesaid program without the benefit of a hearing under 45 C.F.R. §205.10 and in violation of their constitutional rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

18. This action is designated a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure.

19. If Town Court is compelled to close or otherwise cease providing skilled care services to the members of the plaintiff class, they will suffer immediate and irreparable psychological and physical harm.

COUNT III

(Town Court v. Califano)

20. Paragraphs 1 through 8, inclusive, and 11 and 12 above, are incorporated by reference as though set forth in full herein.

21. By letter dated May 17, 1977, defendant Califano, by his agent, Mr. Robert J. Taylor, Director of Long Term Care, Standards Enforcement, Department of Health, Education and Welfare, notified

Town Court that, effective June 18, 1977, its certification as a skilled care facility provider under the Medicare program, pursuant to an agreement dated July 19, 1976, was terminated.

22. In conformity with Federal regulations, Town Court thereupon requested a reconsideration which reconsideration was denied by defendant Califano by his failure to respond to that request as of July 18, 1977.

23. Although Town Court has denied all charges and has requested but not yet received a hearing on the merits, defendant Califano has nevertheless terminated Town Court's participation in the Medicare program.

24. The aforesaid action by defendant Califano violates Town Court's constitutional right to due process under the Fifth Amendment to the United States Constitution.

WHEREFORE, plaintiffs request that this Honorable Court enter the following preliminary and permanent relief against the defendants herein:

1. Enjoin defendants Beal and Califano, their agents, attorneys, deputies, employees and successors from, prior to a final determination of all appeals by Town Court Nursing Center, Inc. from the termination of its Medicare and Medicaid certifications:

a. terminating the Medicare and Medicaid certifications of plaintiff Town Court Nursing Center, Inc.;

b. removing patients who are eligible for Medicare and Medicaid from Town Court Nursing Center, Inc.'s skilled care facility at 1526 Lombard Street, Philadelphia, Pennsylvania;

c. discontinuing or withholding payments to plaintiff Town Court Nursing Center, Inc. for the care of Medicare and Medicaid beneficiaries;

d. prohibiting placement of other Medicare and Medicaid patients with plaintiff Town Court Nursing Center, Inc.;

2. Awarding plaintiff Town Court Nursing Center, Inc. the amount, with interest, of any payments heretofore withheld by either of the defendants on account of their respective decertifications; and

3. Awarding plaintiffs their attorneys fees and costs.

(s) Jeffrey B. Albert
(s) Nathan L. Posner
Jeffrey B. Albert
1401 Walnut Street, 10th Floor
Philadelphia, PA 19102
(215) LO8-5700

Of Counsel:
Fox, Rothschild, O'Brien & Frankel

Commonwealth of Pennsylvania
County of Philadelphia, ss:

DANIEL VELORIC, being duly sworn according to law, deposes and says that he is the president of the plaintiff in the within action, that he is authorized

to and does take this affidavit on behalf of the plaintiffs in this action and that the averments contained in the within complaint are true and correct to the best of his knowledge, information and belief.

(s) Daniel Veloric
Daniel Veloric

Sworn to and Subscribed Before me this 19th day of July, 1977.

(Illegible)
Notary Public
Notary Public, Phila., Philadelphia Co.

My Commission Expires December 16, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

TOWN COURT NURSING CENTER, INC., et al.
Plaintiffs

v.

JOSEPH CALIFANO, JR., Secretary of Health, Education and Welfare,

and

FRANK S. BEAL, Secretary of Public Welfare, Commonwealth of Pennsylvania,
Defendants

III.

MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs, Town Court Nursing Center, Inc., et al., by their attorneys, Nathan L. Posner and Jeffrey B. Albert, Esquires, move this Honorable Court for a temporary restraining order in the form attached hereto restraining defendants as set forth therein pending hearing and determination of plaintiffs' motion for a preliminary injunction, on the ground that immediate

and irreparable injury, loss and damage will result to plaintiffs before such hearing can be held and that notice of the filing of this motion has been given as set forth in the affidavit attached hereto, and plaintiffs further move this Honorable Court for a preliminary injunction granting all preliminary relief prayed for in the Complaint filed in this action.

(s) Jeffrey Albert
Nathan L. Posner
(s) Jeffrey Albert
Attorneys for Plaintiffs

Of Counsel:
Fox, Rothschild, O'Brien & Frankel

Commonwealth of Pennsylvania
County of Philadelphia, ss:

I, Maurice E. Linden, being duly sworn, do hereby state and aver as follows:

1. I am a practicing physician duly licensed in the Commonwealth of Pennsylvania. I maintain offices at 7100 Germantown Avenue, in the City of Philadelphia.

2. I am familiar with Town Court Nursing Center, 1526 Lombard Street, Philadelphia, Pennsylvania and the type of patients who reside there.

3. Town Court is a skilled care facility which has a substantial number of elderly and chronically ill patients.

4. Transfer from such a facility may cause these patients to suffer substantial psychological and physical harm and, in certain circumstances, could increase the possibility of serious illness and even death.

5. Unless an individual patient is clearly shown to be able to withstand the trauma of being moved to another facility, I would not favor such a transfer from Town Court.

Maurice E. Linden M.D.

Sworn to and Subscribed before me this 19th day of July, 1977.

(Illegible)
Notary Public
Notary Public, Phila., Philadelphia Co.

My Commission Expires December 16, 1980

Commonwealth of Pennsylvania
County of Philadelphia, ss:

AFFIDAVIT OF DANIEL VELORIC

I, DANIEL VELORIC, being duly sworn, do hereby state and aver as follows:

1. I am the president of Town Court Nursing Center, Inc. which operates a 198-bed skilled nursing facility, at 1526 Lombard Street, Philadelphia, Pennsylvania.

2. Among the patients presently occupying beds at Town Court approximately 180 have been determined to be eligible under Pennsylvania's Medical

Assistance Program (commonly known as Medicaid), i.e. indigent persons as defined by 62 P.S. §441.1 *et seq.*

3. As a provider of nursing home services to these patients, Town Court may be reimbursed for its services to these patients by the Commonwealth of Pennsylvania if and only if Town Court is certified for participation in the Medicaid program. 62 P.S. §443.1 (3).

4. That certification is obtained pursuant to an agreement entered into between the Commonwealth and Town Court with respect to Town Court's status as a provider.

5. On September 4, 1975 such an agreement was entered into between the Commonwealth and Town Court.

6. By letter dated May 17, 1977 Mr. Robert Taylor, Director, Office of Long Term Care, Standards Enforcement, United States Department of Health, Education and Welfare, terminated Town Court's certification as a provider under the *Medicare* program by failing to renew the then existing provider agreement dated July 19, 1976 between Town Court and the United States Department of Health, Education and Welfare with respect to that program.

7. By letter dated May 20, 1977 Mr. Glenn Johnson, Director, Bureau of Medical Assistance, Department of Public Welfare, Commonwealth of Pennsylvania, terminated Town Court's participation in the Medicaid program "due solely to the fact that HEW has notified us of your Title XVIII termination".

8. No means of review of the determination is provided by the Commonwealth of Pennsylvania as to the merits of the termination, the review being limited to whether "HEW has not decided to terminate your facility from participation in the Medicare program. . . ."

9. No means of review of the termination, by the Federal Government is provided as to the merits *prior to termination* except that Town Court did file a request for reconsideration which request has been ignored.

10. As a result of the aforesaid terminations of Town Court from participation both under the Medicare and Medicaid programs, Town Court is no longer receiving, as of July 19, 1977 any financial reimbursement from any source for the provision of nursing home and related services to any of the individual patients and its other patients, present and prospective, who are or will be entitled to benefits under either of these programs.

11. Town Court will, if no immediate relief is granted it in the instant litigation and insofar as beds are available elsewhere, begin removing plaintiffs from Town Court to other facilities certified for participation in these programs.

12. However, at present there are no known available beds in such facilities and, in fact, there is a tremendous shortage of such beds in the Philadelphia area.

13. Further, Town Court is the largest skilled nursing and intermediate care facility in Philadelphia.

It is constantly being asked by local hospitals and other institutions to admit additional Medicare and Medicaid patients for which Town Court has no room.

14. Therefore, unless immediate relief is granted, Town Court is to be left with the unenviable alternative of treating patients for no compensation whatsoever, or literally dumping these ill elderly on the sidewalks of Lombard Street.

15. Further, even were beds available elsewhere, these patients are likely to suffer what has been described as transfer trauma:

> "The damage which may result from such transfers is irreparable in the true sense of the word. Changes in surroundings and movements of long distances of senior citizens who are suffering from physical and psychological infirmities are likely to aggravate their condition and increase the likelihood of death."

Burchette v. Dumpson, 387 F. Supp. 812, 819 (E.D. N.Y. 1974). See also HEW Technical Assistance Memorandum A.A-TA-75-1 (Feb. 19, 1975).

> "There is a genuine hazard in the relocation of infirm aging persons from one facility to another. Dramatic increases in mortality far in excess of what would normally be expected have been documented."

Quoted in *Klein v. Mathews,* 430 F. Supp. 1005 (D. N.J. 1977), and *Hathaway v. Mathews,* 546 F.2d 227, 231 (7th Cir. 1976).

16. But for the Federal and State termination of Town Court, Town Court would have continued to be and desires to continue as a provider under both the Medicare and Medicaid programs.

(s) Daniel Veloric Pres.
Daniel Veloric

Sworn to and Subscribed before me this 19th day of July, 1977.

(s) Francis M. Killian
Notary Public
Notary Public, Phila., Philadelphia Co.

My Commission Expires December 16, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

TOWN COURT NURSING CENTER, INC., et al.
Plaintiffs

v.

JOSEPH CALIFANO, JR., Secretary of Health,
Education and Welfare,

and

FRANK S. BEAL, Secretary of Public Welfare,
Commonwealth of Pennsylvania,
Defendants

IV.

ORDER

AND NOW, this 21st day of July, 1977, upon consideration of the Verified Complaint, the affidavits submitted therewith, plaintiffs' memorandum of law, the affidavit of plaintiffs' counsel as to the giving of notice to counsel for the defendants herein, and plaintiffs' motions for temporary restraining order and preliminary injunction,

IT IS HEREBY ORDERED AND DECREED that, pursuant to Rule 65 of the Federal Rules of Civil Procedure, the defendants, Frank S. Beal and Joseph A. Califano, Jr., each of them, their agents, attorneys, deputies, employees and successors, shall be enjoined and restrained until 2:00 P.M., Tuesday, July 26, 1977, from:

a. discontinuing or withholding payments to plaintiff Town Court Nursing Center, Inc. for the care of Medicare and Medicaid beneficaries.

Plaintiffs shall file with this Court security in form satisfactory to the Clerk of the Court in the amount of $100.00.

IT IS FURTHER ORDERED that plaintiffs' motion for preliminary injunction shall be heard by this Court on the day of Tuesday, July 26, 1977 at 2:00 P.M. in Courtroom at the United States Courthouse, 6th & Market Street, Philadelphia, Pennsylvania.

IT IS FURTHER ORDERED that a true copy of this Order together with the Summons, Complaint, Affidavits and Memorandum of Law be served within three (3) days of the date hereof upon each of the Defendants. Service and the return of service may be made by any competent persons eighteen (18) years of age or older.

(s) John P. Fullam
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

TOWN COURT NURSING CENTER, INC., et al.
Plaintiffs

v.

JOSEPH CALIFANO, JR., Secretary of Health,
Education and Welfare

and

FRANK S. BEAL, Secretary of Public Welfare,
Commonwealth of Pennsylvania,
Defendants

V.

DEFENDANT'S MOTION TO DISMISS

The defendant Secretary Frank S. Beal, by his attorney, M. Faith Angell, Deputy Attorney General for Eastern Pennsylvania, reserving the right to file an answer on the merits if the same is required, hereby moves the Court to dismiss plaintiffs' Complaint under Federal Rule of Civil Procedure 12(b) for the following reasons:

1. The Complaint fails to state a claim against Defendant Beal upon which relief can be granted.

2. The Court lacks subject matter jurisdiction.

3. The absence of a pre-termination hearing fails to rise to a due process constitutional violation.

This Motion is based on the accompanying Memorandum of Law.

Respectfully submitted,

(s) M. Faith Angell
Deputy Attorney General
Michael von Moschzisker
Deputy Attorney General,
Eastern Regional Director
Robert P. Kane
Attorney General

206 State Office Building
Philadelphia, Pa. 19130
Telephone: (215) 238-6661

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2474

Town Court Nursing Center, Inc. et al.
Plaintiffs

v.

Joseph A. Califano, Jr., Secretary of Health, Education & Welfare

and

Frank S Beal, Secretary of Public Welfare, Commonwealth of Pennsylvania,
Defendants

VI.

MOTION TO DISMISS

Defendant, JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare, moves this Honorable Court pursuant to Federal Rule of Civil Procedure 12(b) to dismiss the complaint against him for the reason that this Court lacks jurisdiction

over the subject matter, and that the plaintiffs have failed to establish entitlement to injunctive relief.

Respectfully submitted,
/s/ David W. Marston
United States Attorney
/s/ Robert N. deLuca
Assistant United States Attorney
Chief, Civil Division

Dated: 29 August 1977

VII.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PLAINTIFFS' MOTION FOR EXTENSION AND RENEWAL OF PRELIMINARY INJUNCTION

[Caption Omitted]

---

1. On July 27, 1977 this Honorable Court issued an order granting plaintiffs certain preliminary injunctive relief until such time as the United States Department of Health, Education and Welfare gave the parties five (5) days notice of its decision with respect to the request by plaintiff, Town Court Nursing Center, Inc., for reconsideration of HEW's decision to terminate Town Court's status as a Medicare provider.

2. On September 9, 1977, by hand delivery, Town Court, but neither its counsel nor counsel for the individual plaintiffs, received notice that HEW had denied Town Court's request for reconsideration on August 4, 1977, and that such decision would become effective on September 14, 1977.

3. Since the State inspection on June 24, 1977, there has been no Federal or State inspection of Town Court.

4. During the period prior to the reconsideration decision, as well as thereafter, to best of plaintiffs' knowledge, information and belief, no efforts have been made by defendants to gain knowledge of the then existing conditions at Town Court.

5. During the period prior to the reconsideration decision, as well as thereafter, Town Court has not

been requested by either defendant to change or correct any condition then existing at Town Court.

6. Town Court continues to provide the excellent quality of care and physical environment testified to by plaintiffs' witnesses at the hearing held on July 26 and 27, 1977, which testimony is incorporated herein, by reference.

7. The parties-plaintiff will suffer immediate and irreparable harm if the preliminary injunctive relief granted them on July 27, 1977 is not continued until such time as Town Court's rights to participation in the Medicare and Medicaid programs are fully and finally adjudicated after hearing and judicial review, if necessary.

8. There is no adequate remedy at law.

WHEREFORE, plaintiffs respectfully request this Honorable Court to extend and renew the preliminary injunction issued on July 27, 1977 until such time as plaintiffs have exhausted their rights to seek review of defendants' efforts to terminate Town Court Nursing Center, Inc. as a Medicare and Medicaid provider.

(s) Nathan L. Posner
Nathan L. Posner
Jeffrey B. Albert
Attorneys for Town Court Nursing Center, Inc.

(s) William F. Coyle
William F. Coyle
Attorney for Emma Cooper et al.

Of Counsel:
Fox, Rothschild, O'Brien & Frankel

VIII.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AFFIDAVIT OF CLAUDETTE V. CAMPBELL

[Caption Omitted]

State of Pennsylvania
County of Philadelphia *ss*

CLAUDETTE V. CAMPBELL, being duly sworn, deposes and says as follows:

I am Claudette V. Campbell, a registered nurse with a Bachelor of Science degree in Nursing and a Master of Public Health degree. I am a Commissioned Officer in the United States Public Health Service, holding the rank of Senior Nurse Officer. In 1974, I received an appointment as Program Officer/Nurse Consultant to the Office of Long Term Care Standards Enforcement. This agency was incorporated into the Health Standards and Quality Bureau, Health Care Financing Administration, Region III, United States Department of Health, Education and Welfare on June 19, 1977.

One of my functions as the Regional Office Long Term Care Nurse Consultant is to review provider files prepared for termination from participation in the Medicare/Medicaid program. The purpose of my review is to ensure that Federal health standards have been applied and documented substantially in accordance with Federal regulations. The other critical determination that is made is an evaluation of the effect of non-compliance with the Conditions of Participation on the health and safety of patients in the facility under review. My findings are a result of a thorough review of all documentation submitted by the State agency and a review of the provider file. After the above review is completed, I recommend either concurrence or non-concurrence with the adverse action to the Director, Office of Long Term Care Standards Enforcement.

The following statement summarizes the developments culminating in my decision on May 12, 1977 to recommend to the Director of the Office of Long Term Care Standards Enforcement acceptance of the State survey agency's recommendation of non-renewal of Town Court Nursing Center's provider agreement, which had expired April 30, 1977.

1. On January 1, 1967, the facility received conditional approval for participation in the Medicare program based on the State agency's finding of a serious nurse staffing deficiency. Other deficiencies related to the requirement that oral orders should only be given to a licensed nurse, and reduced immediately to writing, and physicians should be advised of stop order policies and contacted for renewal of orders.

2. On May 9, 1968, a supplement to the initial agreement was issued to the facility based on substantial progress in correcting deficiencies outlined above. However, remaining deficiencies noted included pharmaceutical services: all medications administered to patients were not ordered in writing by the patient's physician, oral orders were not given only to a licensed nurse, and were not immediately reduced to writing.

3. A State survey agency visit on September 8-9, 1971 resulted in deficiencies being noted, including the following: physicians orders were not being revised every 30 days, and maintenance of sanitary conditions in the entire kitchen area including store rooms and staff dining room areas was "deplorable".

4. The State survey agency made a special visit to the facility on January 28, 1972 and found deficiencies previously listed corrected, but an additional deficiency noted was in Nursing Service in that there was no night supervising nurse for the three weeks prior to the survey.

5. On April 10, 1972, a supplemental agreement was issued as a result of the facility's substantial compliance, with correctible deficiencies. The deficiencies noted include incorrect storage of medication and poor housekeeping.

6. A survey performed by the State agency on October 23, 1973 revealed deficiencies including nursing staff shortages, an unlicensed nurse as shift supervisor, medications not properly recorded, labeled, or stored, narcotic records not properly maintained, patient call bells removed, and inadequate housekeeping.

7. A special unannounced survey visit on March 19-20, 1974 by the State agency revealed numerous serious deficiencies and the results were transmitted to Office of Long Term Care Standards Enforcement with a termination recommendation. (See Attachment 1).

8. On March 28, 1974 the facility received an extention to their agreement to May 31, 1974 to determine whether compliance with the Conditions of Participation had been achieved.

9. On May 9, 10 and 15, 1974, an unannounced licensure visit was conducted and revealed continuing major deficiencies. (See Attachment 2).

10. On May 22, 1974, the facility was notified that it was being given a short term agreement, for a period of 90 days, from June 1, 1974 to August 31, 1974, to correct the deficiencies that were found during survey visits on March 19 and 20, 1974.

11. Based on the results of revisits by the State survey agency on May 9, 10, 15, 1974 and June 3, 4, 5, 1974 (see Attachment 3), a recommendation of non-renewal was made by the State survey agency.

12. On September 30, 1974, the facility was notified that its provider agreement would not be renewed and that its participation in the program was terminated as of October 31, 1974.

13. Survey results of April 14, 1976 revealed no deficiencies, and the facility was readmitted to the program effective that date.

14. The Office of Long Term Care Standards Enforcement received a request from the District Attorney's Office, Philadelphia, Pennsylvania, Economic Crime Unit, to investigate complaints of poor care at the facility on July 8, 1976.

15. A Federal survey performed July 19-23, 1976 substantiated the above complaint. In addition, the following Conditions of Participation were not met:

Medical Direction and Nursing Services. The Conditions of Participation for Physican Services and Dietary Services were only marginally met, and additional standards were found not met. (See Attachment 4).

16. On November 22-24, 1976, an unannounced survey was performed by the State survey agency. An Office of Long Term Care Standards Enforcement staff member participated in the survey on November 22, 1976. A physician from the State survey agency also participated. The same and additional Conditions of Participation and standards were found not met. (See Attachment 5).

17. The facility filed a Plan of Correction dated February 10, 1977 which was unacceptable to the State survey agency based on omission of completion dates for the correction of deficiencies. A new plan of correction was submitted March 17, 1977 showing completion dates.

18. On April 21, 1977, the Pennsylvania Department of Health forwarded the November 1976 and March 1977 survey results with a Certification and Transmittal recommending non-renewal of the facility's provider agreement.

Non-compliance with the Conditions of Participation impacts significantly on the health and safety of the patients at Town Court and poses a threat to their welfare. It is imperative that medical direction, physician services, nursing services, and pharmaceutical services, be provided in a safe and adequate manner. The State survey findings reveals significant omissions in these areas.

Of equal importance in my concurrence with the recommendation of non-renewal was the pattern demonstrated by the facility of having the same standards not met on successive resurveys starting from 1974 through 1977. The facility has not performed in a responsible matter with respect to maintenance of health standards in order to ensure adequate and safe services. The history on file clearly demonstrates this central weakness in the facility. All of the above can be substantiated by a careful review and analysis of the actual reports.

(s) Claudette V. Campbell
Claudette V. Campbell

Sworn to and subscribed before me this 14th day of September, 1977.

Kathleen Taylor
Notary Public
Philadelphia, Philadelphia Co.

My commission expires October 31, 1977.

ATTACHMENT 1

Supplemental

Form Approved
Budget Bureau No. 72-R0725.

CERTIFICATION AND TRANSMITTAL

PROVIDER NUMBER: 39-5129

TO BE COMPLETED BY STATE AGENCY

1. NAME AND ADDRESS OF FACILITY

Tem Court Nursing Center, Inc.
1526 Lombard Street
Philadelphia, Pennsylvania 19146

2. TYPE OF FACILITY
(a) ☐ Gen. Hosp. (b) ☐ Psych. Hosp. (c) ☐ TB Hosp. (d) ☒ ECF (e) ☐ HHA (f) ☐ Independent Lab. (g) ☐ Portable X-ray (h) ☐ Outpatient Physical Therapy

TO:
BHI Regional Representative
Regional Office, Philadelphia, Penna.

4. TYPE OF ACTION
(a) ☐ Initial (b) ☐ Recertification (c) ☐ Reconsideration (d) ☐ Change of Ownership

5. DATE OF APPLICATION: 11/30/65

6. STATE: Pennsylvania

7. PURSUANT TO PROVISIONS OF SEC. 1864 OF THE SOCIAL SECURITY ACT, AND UPON CONSIDERATION OF ALL FACTS, THE FACILITY IS CERTIFIED AS:

(a) ☐ In substantial compliance with the conditions of participation (with no significant deficiencies)

(b) ☐ In substantial compliance with the conditions of participation (with correctable deficiencies)

(c) ☐ Meeting the conditions for special certification (limited access)

(d) ☒ Not (or no longer) in compliance with conditions of participation or the requirements for special certification (limited access).

8. SUPPLEMENTAL INFORMATION ON HOSPITALS AND ECF'S NOT IN COMPLIANCE

(a)(1) ☐ Hospital meets emergency services hospital definitions
(2) ☐ Does not meet
(b)(1) ☐ Facility meets 1861(e)(1)-Definition of hospital
(2) ☐ Does not meet
(c)(1) ☐ Facility meets 1861(j)(12)-Definition of ECF
(2) ☐ Does not meet
(3) ☐ See attached SSA-1539(a)

9. "DISTINCT PART" CERTIFICATIONS
(a) Beds certified
(b) Beds prev. certified

10. ACCREDITATION VERIFIED
(a) ☐ JCAH (b) ☐ AOA

11. RECERTIFICATIONS (Change in accreditation status only) (a) ☐ Accredited (b) ☐ Lost JCAH accreditation (c) ☐ Lost AOA accreditation

12. RECOMMENDED RE-SURVEY DATE

13. CONDITIONS OF PARTICIPATION WITH SIGNIFICANT DEFICIENCIES (Circle) (completed when items 7b, 7c, or 7d are checked.)

I (II) (III) (IV) (V) (VI) VII (VIII) IX X XI XII (XIII) XIV (XV)
(XVI) (XVII) XVIII XIX XX XXI XXII XXIII XXIV XXV

14. EVIDENCE AND REASONING (Include results of consultation)

Certification relates to entire facility: 138 Beds.

Termination of provider agreement is recommended as deficiencies identified place health and safety of patients in jeopardy.

☐ CONT. ON ATTACHED SHEET

15. PREPARED BY
Jack E. Sinnar, R.E.

16. DATE: 3/20/74

TITLE
Registered Nurse

17. REVIEWED BY
John W. Simmons, M.D.
Exec. Dep. Sec., Dept. of Health

18. DATE

TO BE COMPLETED BY

19. DETERMINATION OF ELIGIBILITY
(a) ☐ Facility is eligible to participate (b) ☐ Facility is not (or no longer) eligible to participate

20. ☐ Facility is in compliance with Title VI of Civil Rights Act

21. EFFECTIVE DATE OF:
(a) Participation (b) Termination

MEDICARE BRANCH
DIVISION OF NURSING HOMES

(c) Emergency Services

22. AS ACTIONS
(a) ☐ Voluntary Termination (b) ☐ Other (Specify)

23. INTERMEDIARY NUMBER

24. REMARKS

52

25. DATE

Opposing Affidavit of C.V. Campbell

36a

March 27, 1974

Madeleine S. Bowen, R.N.
Field Representative
Standards and Licensure

Narrative Report

An unannounced visit was made to Town Court Nursing Home, 1526 Lombard Street, Philadelphia, Pennsylvania 19146 for the purpose of investigating a complaint and documenting a post recertification Medicare and Medicaid visit.

Mrs. Marjorie Steever, R.N. Survey Validation Office, Department of Health, Mr. Jack Slusser, R.N. and Mrs. Madeleine Bowen, R.N., Field Representatives from the Southeastern Regional Office, were admitted to the facility at 9:35 P.M. on March 19, 1974. The visit was terminated at 2:45 A.M. on March 20, 1974.

This facility is a five (5) story brick and masonry building in the densely populated area of Philadelphia. The capacity is 138 beds. Patients are housed on the second (2), third (3) and fourth (4) floors. The census on the night of the visit was 134 patients. Several patients had been sent to the hospital. Eighty-seven (87) patients were on Medical Assistance and 13 were on Medicare.

A nurses aide admitted the representatives to the home and then summoned Mrs. Walker, R.N., Supervisor on the 3-11 tour of duty. The representatives introduced themselves and Mrs. Bowen stated the purpose of the visit. Mrs. Walker, R.N. was advised to notify the Administrator Mr. John Thomas

of the presence of the representatives in the facility and the purpose of the visit.

Mrs. Walker telephoned Mr. Thomas.

Mr. Thomas spoke with Mrs. Bowen on the telephone. He offered to come into the home and be available. He was informed that most of the necessary data was readily available except the closed files which were locked in his office. Upon questioning by Mr. Thomas, Mrs. Bowen stated she hoped to complete the visit in two (2) hours, but could not say for certain how much time would be necessary since the survey had not yet begun. Mr. Thomas related that his traveling time was 40 minutes each way and therefore he would not come in for the visit.

Mr. Thomas is an unlicensed nursing home administrator and is planning to take the state licensure examination in April 1974. He had been advised by Mrs. Bowen on January 14, 1974 to apply for a provisional license but has failed to do so because of the cost involved.

Mrs Walker, R.N. supervisor on the 3-11 tour of duty was from an agency known as Medical Personnel Pool and was not an employee of the home. She stated she worked at Town Court an average of three (3) evenings a week.

Mrs. Walker provided Mr. Slusser with the current nursing time schedules for his review while Mrs. Steever and Mrs. Bowen conducted a tour of the fifth (5) floor.

Discrepancies were found in staffing of nursing personnel. Mrs. Moise, R.N. 11-7 and Mrs. De-

Vastey, R.N. 3-11 appeared on the nursing schedule but it was learned that Mrs. Moise had not worked for several weeks and Mrs. DeVastey had resigned. The nurse on 11-7 tour of duty, Mrs. Bernard was a foreign nurse not licensed in Pennsylvania. The nursing schedule showed no 3-11 R.N. scheduled on March 15, 16, 17, 1974. On the 7-3 tour of duty on March 16, 17, 1974 there was no scheduled relief for the Director of Nurses. There were quantitative deficiencies on the 7-3 tour of duty on March 16, 17, on 3-11 on March 15, 16, 17, and on 11-7 on March 14, 16, 17th. There was a time clock and time cards in the nurses station on second (2) floor but almost all of the time cards were blank.

Mrs. Smith, a nurses aide on her first night of duty had been assigned to another nurses aide for orientation. Nurses aides on the 11-7 tour of duty "thought" they had inservice, but could not relate to the last topic discussed.

Fifth Floor

Two (2) nursing personnel were on the 5th floor, Mrs. Bush L.P.N. and an aide. Mrs. Bush, L.P.N. was in charge of the fifth floor and accompanied the representatives. The census on this floor was 34 patients. Plastic bags of soiled linen were found in the hallway and the alcove near the refrigerator. The refrigerator was soiled with spilled juice. In Rooms 511 and 516, foley catheter bags were observed lying on the floor. There was no H_2O glass or cup in room 513, water pitchers in rooms 512, 514, and 516 were empty and one unit in 516 had no water pitcher. All other pitchers were almost empty and only one pitcher

was filled with water containing ice. In room 511, two (2) soiled bedpans were on the floor. The medication cardex showed many medications had not been given; nursing care plans were incomplete and the vital sign book had no recording since January.

A patient, Rabbi Sobol was awake and got out of bed to talk to the representatives when they entered his room. Initially his speech was very fast, garbled and unintelligible. Mrs. Bush stated that he was disoriented. After a few minutes Rabbi Sobol was able to speak clearly and coherently. He was fully mobile and moved and walked about freely and easily. He appeared anxious and agitated as he told the representatives that he was not allowed to go outside of the home at all even though he was capable of doing so. He also spoke about his house and was concerned about the disposition of his property. He complained about the food in the facility stating that it was not to his taste. He insisted that Mrs. Bowen write the repesentatives names on paper and where they were from. He took this piece of paper and put it in a book on his bedside table. He asked the representatives to help him and his wife get out of this home. His wife is a patient on the same floor and according to the nurse is also capable of self care. Rabbi Sobol followed the representatives out into the hall pleading with them to help him get out of this facility. Mrs. Bowen accompanied him back into his room and listened to him for at least 10 minutes. He was very reluctant to permit her to leave.

A review of Rabbi Sobol's chart revealed the presence of an application to the Home for the Jewish Aged. No social service notes were on the chart.

Rabbi Isiah Sobol's clinical record revealed that there was an order for a Kosher Diet and force fluids which did not appear on the Nursing Care Plan. The medication record indicated the patient did not receive Mellaril 15 mg. T i d on March 6, 9, through March 13, 15, 16, 17, 1974. The order was changed to Mellaril 25 mg. T i d on March 17. There was no indication on the record whether it was obtained or given. Although the physicians order was for "force fluids-water and juices" there was no current intake and output record on the chart. Nurses notes stated that Rabbi Sobol frequently requested fruit juice for constipation but that fruit juice was not available.

In Room 512, Mrs. Gerard, a 64 year old patient was observed lying in bed clad only in underpants. The bedclothes were in disarray and one bedside rail was down. Mrs. Bowen spoke with Mrs. Gerard who was unable to respond to questions such as "how are you?", and "do you know where you are?" Mrs. Gerard responded by spelling her first name which is Elodie. This patient appeared very sluggish and drowsy. There was not water on her bedside table. Mrs. Bush put a gown on the patient, explaining that Mrs. Gerard frequently disrobed.

Mrs. Gerard's clinical record revealed that she was admitted to Town Court Nursing Home on May 3, 1973 from Albert Einstein Medical Center Psychiatric Unit. Her diagnosis at Albert Einstein was Depression. The initial physical examination done at Town Court stated a diagnosis of Cerebral Arteriosclerosis. The discharge summary from Albert Einstein stated that this patient was an Alcoholic and

had had a previous admission to their Psychiatric Unit.

Upon questioning, Mrs. Bush, L.P.N., stated that Mrs. Gerard was usually a lively interested individual who participated in many activities in the home and was very well liked by the other patients. She stated that in the past month Mrs. Gerard had "failed" and was withdrawn, disoriented, frequently disrobed and attempted to climb out of bed, and that her food and fluid intake was poor. She sometimes wandered around the 5th floor at night.

A review of the clinical record revealed that Mrs. Gerard had been under the care of Dr. Gottlieb. On February 27, 1974 she was seen by Dr. Schwartz because she apparently had an upper respiratory infection. Doctor's progress notes indicate her temperature was 101 degrees and her pulse was 120 at that time. No respiratory rate was recorded. The only temperature recorded on the record was in May 1973. Dr. Schwartz wrote an order for Robitussin and an order to take all vital signs 4 times daily for 4 days. No record of any vital signs was found on the clinical record or the vital sign book. However, the order had been transcribed onto the medication sheet and initialed in the appropriate spaces by a nurse. On February 28, 1974, a verbal order was written on the Doctors order sheet to transfer Mrs. Gerard to the service of Dr. Kramer. The Verbal order had not been co-signed by Dr. Gottlieb. On March 1, 1974, progress notes written by Dr. Storey stated the patient had a Upper Respiratory Infection, Tracheo bronchitis, Dehydration, and possible Electrolyte Imbalance. He ordered Tetracycline, force fluids, water

and juices, discontinue Lasix and discontinue Mellaril. Nurses notes on March 1 stated only that fluids were forced and patient slept all day. No intake or output record was kept. On March 2, 3rd, Tetracycline was charted as given intramuscularly; it had been ordered by mouth. On March 3, 1974 the patient was sent to Graduate Hospital of the University of Pennsylvania because of her upper respiratory infection. A note from the hospital signed by Dr. Freedman stated that Mrs. Gerard had Laryngitis, Bronchitis, and moderate dehydration. A prescription for Pen VK was returned to Town Court with the patient the same evening. No nurses notes were written from the time the patient was sent to the hospital until March 7, 4 days later, on the 11-7 and 3-11 tour of duty.

On March 4, Dr. Adelman discontinued the Pen VK which had never been given, and ordered Tetracycline continued which was not recorded as given. He ordered fluids pushed to 2000 cc per day. No record of any intake was available on the clinical record. On March 17, Thorazine was ordered by Dr. Kramer.

The Nursing Care Plan for this patient stated only that the patient's status was stationary; the block marked "withdrawn" had not been checked. No other information was on the nursing care plan.

Nursing summaries were incomplete and lacked any information indicating the patient's real condition mentally, physically or emotionally. One nurse's notation on the night tour of duty stated that the patient had been restless and walking around requesting food and drink, but no food or juice was avail-

able. No nursing assessment had been recorded. Doctor's progress notes dated September, October, November and January were illegible.

Fourth Floor—Census 39

3-11 Charge nurse Mrs. Clark—Aides

11-7 Charge nurse Mrs. Williams—L.P.N. (W)

Mr. Slusser conducted a tour of the 4th floor. There was a notable odor of urine upon entering the lounge area from the elevator. Mrs. Williams, L.P.N. (W) was in charge of the 4th and 3rd floors on the 11-7 tour of duty. She accompanied the representative on complete rounds, and was very knowledgable of all the patients on these areas.

Mrs. Bernard, supervising nurse on 11-7 tour of duty frequently consulted Mrs. Williams in regard to extra procedures and routines, i.e., she asked Mrs. Williams to leave her areas of duty and come to the second floor to identify the proper key to the emergency drug kit.

Medication records on fourth floor revealed that some patients did not receive medications on the following dates, February 11, 12, 13, 14, 18, 20, 25, 27th, March 6, 10, 12, 16, 18, and 19th.

Mrs. Edna Kirkoff was Medicare patient in room 412. She had been admitted to Town Court Nursing Home on February 15, 1974 from Graduate Hospital with a diagnosis of Right Cerebral Vascular Accident, Diabetic. Ulcer of left leg, and Arteriosclerosis Obliterans. The patient had a nasogastric tube in place at the time of admission. On February 24, and March

1, 1974 Mrs. Kirkoff was sent to Graduate Hospital for reinsertion of the nasogastric tube after she had pulled it out. Nurses notes on March 1st indicate that after the tube was reinserted at the hospital during the day tour of duty, and the patient again pulled it out on the 3-11 tour of duty. No nurses notes were written until March 3, 1974 when "tube feeding" was noted.

There was no report of a chest x-ray or urinalysis on the record. The patient did not receive her Mandelamine on March 2, at 6 and 10 P.M. nor her Lanoxin on March 12, 1974. No tube feeding was recorded on the medication sheet on March 1, 2, 6, at 6 and 10 P.M. and on March 12 at 10 and 2 P.M. Betadine was ordered to the ulcer of left leg 2 times a day, however it was recorded on the medication record only 4 times for March.

A nursing care plan for Mrs. Kirkoff was forwarded to Town Court from the hospital. The nursing care plan was as follows:

Stimulate patient by talking to her
Mouth care
Catheter care
Good skin care
Ulcer care
Bath oil, dry skin
OOB b.i.d., try diversion
Posey mitt to hands, remove T.i.d.
Naso-gastric Tube
Watch for impaction, sit up hi—fowlers for feeding.

The nursing care plan at Town Court read as follows:

"Return to A D L, Needs full nursing care, needs to be oriented."

Jennie Bradley was a medicare patient in room 412. She is 79 years old and was admitted on January 25, 1974 from St. Agnes Hospital. The nursing care plan from the hospital read as follows:

Encourage to feed using extremities assist ambulating due to vision and balance, wear neck brace OOB, cervical collar in bed

soft diet

ROM Therapy

commode after breakfast

watch for decubiti after brace is removed

There was no nursing care plan for this patient at Town Court. Nurses notes stated "routine care." There was no discharge summary on the record. The patient's temperature had not been taken since admission on January 25, 1974.

Third Floor—Census 39

3-11 Mrs. Booker, LPN—charge nurse—aides

11-7 Mrs. Williams—2 aides

A tour of third floor was made by Mrs. Bowen accompanied by Mrs. Booker, LPN. In rooms 214, 317, and 320 there were no drinking cups; there was also a strong odor of urine. Soiled bedpans were on the floor in patients rooms. In room 320 a Foley Catheter drainage bag was lying on the floor. In room 307, two (2) bedside units lacked water pitchers. Water pitchers were almost empty and

none contained any ice. External drugs i.e., eye drops and nose drops were unlocked at the nurses station.

Nursing Care Plans were either not done at all or incomplete. Medication sheets dated October and November 1973 were loosely piled on the desk at the nurses station.

A review of the medication records revealed that on March 12 and 17, 1974, no medications had been given on the 3-11 tour of duty. There was no record that Insulin had been given to Joshua Williams on March 10, 11, 1974. Valison ointment and Benadryl ordered for Mrs. Helen Davis on March 14, were not started until March 17. No medications were recorded as given to Dora Vashen on March 6, 1974, or to Thomas Butler on February 27.

The tour was concluded with a visit to the Dietary Department by Mrs. Steever, Mrs. Bowen and Mr. Slusser accompanied by Mrs. Bernard supervising nurse. A large bowl of eggs was found unrefrigerated. Since there was no juice available on any patient floors, Mr. Slusser advised Mrs. Bernard to take a can of orange juice which was stored in the breakfast cart. Mrs. Bernard picked an opened can of juice, but Mr. Slusser urged her to take a full unopened can, which she did with some reluctance.

Sanitation in the kitchen was satisfactory. Food stores were locked and could not be surveyed.

A special visit was made to this facility by Mrs. Madeleine Bowen, R.N. Field Representative and Mr. Jack Slusser, R.N. Assistant Supervisor Standards and Licensure, Department of Public Welfare and Mrs. Marjorie R. Steever, R.N. Survey Validation Officer, Division of Licensure and Certification,

Department of Health on the night of March 19, 1974, and by Mrs. Phoebe Somma, R.N., and Mrs. Mary P. Berman, R. N., Field Representatives, Department of Public Welfare Division of Standards and Licensure on the morning of March 20, 1974.

The purpose of the visit was to investigate regarding a patient care complaint and follow-up on the 2567 (B) corrective action taken. As indicated in the attached summary this facility has had on numerous survey visits patient care deficiencies which represents a hazard to the health and safety of the patients within the facility. A post-certification revisit report and certification and transmittal is attached for the March 19, and 20, visits.

A recommendation for termination of the provider agreement is being made.

March 18, 1974

Subject: Town Court Nursing Home
To: File

From: Madeleine S. Bowen, R.N.
Field Representative
Standards and Licensure

Mrs. Philomena Shewcheck a complainant was telephoned on March 15, 1974 and asked to write her complaint and be more specific as to the charges of negligence, inadequate care, inhuman and degrading treatment.

Mrs. Shewcheck replied she is very burdened at home at present with an ill husband and father-in-

law and will try in the near future to write to the Department of Standards and Licensure specifically stating her complaints.

Mrs. Shewcheck said she did not want to become involved today. She stated that the patient Wanda Nefka, had died after being transferred from Town Court to a hospital where she laid 7 1/2 hours before being identified. She said that another patient at Town Court was refused water because she was incontinent.

Mrs. Shewcheck concluded the conversation by saying she would write to this office in a week or two.

March 22, 1974

Subject: Town Court Nursing Center
To: File

From: (Mrs.) Phoebe Somma, R.N.
(Mrs.) Mary Berman, R.N.
Field Representatives
Standards and Licensure

A special unannounced visit was made March 20, 1974 to Town Court Nursing Center by Field Representatives Mary Berman and Phoebe Somma; following the unannounced night visit of March 19, 1974.

Mr. Thomas, acting administrator accompanied Field Representatives and Mrs. Gross, R.N. Director of Nursing Services joined the surveyors during the tour of patient care areas.

Fifth (5) Floor

Census 34—staffed by one (1) L.P.N. (waiver) and two (2) nurses aides.

Mrs. Adelman, a patient in Room 509 was of serious concern to surveyors; this concern was also evidenced during the special unannounced visit made the previous night (see previous report). Review of her clinical record on March 20, 1974 revealed the medication, ampicillin, had been secured from the Pharmacy. Although the medication label was dated March 19, 1974 there was no documentation that the prescribed dose of ampicillin (ten (10) cc every six (6) hours) was given until 12 noon on March 20, 1974. The L.P.N. on duty stated she did not know why the medication was not given as ordered. Patient's temperature recorded as (104) (R) at 8:00 A.M.—100 (R) at noon. Intake and output was recorded from 8:00 A.M. until time of visit (12:30 P.M.)

Mrs. E. Pennington, patient in Room 501, admitted March 15, 1974, verbalized complaints involving rough handling and verbal abuse by staff members; no particular personnel named. Clinical record reviewed to ascertain prescribed medications and treatments. Verbal physician's orders revealed an order for insulin, Colase and a sitz bath treatments. Insulin and colase were charted as being given but no record of sitz bath treatment. While conversing with patient, her daughter brought in two bottles of medications, which the patient had been receiving at home on a daily basis (Dilantin and Urecholine). These were given to Mrs. Gross, R.N. by the patient's

daughter. Neither of these medications appeared on physician's order sheet.

Fourth (4) Floor

Census 39—staffed by one (1) L.P.N. (waiver), four (4) nurses aides.

Very offensive odor of urine permeated the entire floor.

Clinical record of Amaza Smith revealed medication had not been

Third (3) Floor

Census 39—staffed by one (1) L.P.N. (examination) and four (4) nurses aides.

Viola Thomas in Room 309 was observed to be having difficulty eating her lunch. Upon investigation the patient stated she was partially blind and her fingers were observed to be severely deformed by an arthritic-like condition. She stated she does require assistance with her meals but does not receive it. She further stated the nurses yell and curse at her when she requests help.

Clinical record of Hermin Garfinkle revealed his medications had not been charted as given since March 19, 1974.

Clinical record of Mabel Watson revealed medications had not been charted as given since March 1, 1974.

Second (2) Floor

Census 24—staffed by one (1) R.N. three (3) nurses aides.

Random selection of clinical records revealed no major discrepancies in charting.

Review of closed clinical records in administrator office.

Charles Alexander admitted March 15, 1974 expired March 19, 1974. Physical examination on admission, stated Nutrition was poor, admitting diagnosis Heart failure. Nurses notes were not written at time of admission, nor in chronological order thereafter.

One medication (Lasix 40 mgm O.D.) ordered by physician on admission, was not recorded as being given during the patient's stay. Verbal orders of March 17, 1974 were not signed by physicians. No discharge progress note by physician.

Celia Diamond discharged to Graduate Hospital on March 18, 1974.

March 13, 1974 nurses notes stated patient fell hitting the back of her head resulting in a laceration. She was sent to Graduate Hospital for X-rays and sutures. The next entry in nurses notes on March 18, 1974 stated patient appears very pale and lethargic, slurred speech, temperature 102, and vomiting and bile colored fluid. Transferred to Graduate Hospital with all her belongings.

In reference to a complaint received in Regional Office on March 15, 1974, Wanda Meks's clinical record was reviewed, patient was admitted January 3, 1974 with a diagnosis of arteriosclerotic, cardiovascular disease, chronic heart failure, and diabetes. No significant nurses notes until January 17, 1974, at which time note stated patient looks poor vital signs: no pulse, respirations 43. B/P 120/60. Dr. Nathanson notified instructed nurses to give Lasi 40 mgm i.m.

Next entry stated—patient transferred to Presbyterian Hospital where according to complainant she expired. No progress notes by physician except one entry which states "see P.E.". No intake or output recorded despite diagnosis and diuretic medication order.

Following this visit and reviewing the above facts it is the opinion of the surveyors that the care rendered to the patients in this facility is jeopardizing their health and safety.

PS:MB/lg

(s) Mary P. Berman, R.N.
(s) Phoebe Somma, R.N.

Town Court Nursing Home
March 20, 1974

A special visit was made to this facility by Mrs. Madeleine Bowen, R.N. Field Representative and Mr. Jack Slusser, R.N. Assistant Supervisor Standards and Licensure, Department of Public Welfare and Mrs. Marjorie R. Steever, R.N. Survey Validation Officer, Division of Licensure and Certification, Department of Health on the night of March 19, 1974, and by Mrs. Phoebe Somma, R.N., and Mrs. Mary P. Berman, R.N., Field Representatives, Department of Public Welfare Division of Standards and Licensure on the morning of March 20, 1974.

The purpose of the visit was to investigate regarding a patient care complaint and follow-up on the 2567 (B) corrective action taken. As indicated in the attached summary this facility has had on numer-

ous survey visits patient care deficiencies which represents a hazard to the health and safety of the patients within the facility. A post-certification revisit report and certification and transmittal is attached for the March 19, and 20, visits.

A recommendation for termination of the provider agreement is being made.

ATTACHMENT 2

Subject: Town Court Nursing Home
To: File

From: (Mrs.) Madeleine S. Bowen, R.N.
Standards and Licensure
Field Representative

Summary:

An unannounced licensure visit was made at Town Court Nursing Home on May 9, 10, and 15, 1974. Mr. Jack Slusser, R.N., Mrs. Mary Berman, R.N. and Mrs. Madeleine Bowen, R.N. conducted the survey. Mr. Thomas, Administrator, Mrs. Moody, Assistant Administrator, and Mrs. Gross, Director of Nursing, accompanied and assisted the surveyors.

On April 3, 1974 this facility received a certified registered letter citing 26 deficiencies found at the time of an unannounced night visit on March 19, 1974. A thirty (30) day period was allotted to the facility to provide time for those corrections needed in order to meet full compliance with the State regulations.

The survey revealed that some deficiencies had been corrected. Mr. Thomas had a temporary administrators license and had taken the administrators examination. Disaster Plans had been posted, linen supplies were increased, call bells were available many more medications were being charted and more nursing care plans were available.

Major deficiencies continued to exist in staffing, nursing care, medications, clinical records, physicians orders and in the dietary department. The census remains at 138 and in the past 5 1/2 months 65 patients had been transferred to hospital, 19 had expired, and 26 had been sent home or to other nursing homes. Because of the unusually high number of hospital admission, 26 closed records were reviewed and it was revealed that only 2 of 20 patients were transferred or discharged with a physician's order. Two (2) bodies had been removed from the facility before pronouncement of death by the physician. One (1) clinical record contained no pronouncement of death.

It was also discovered that on April 28 telephone verbal orders were received and signed "Carol Fertig, R.N." although Miss Fertig did not work on that day. The writing appeared to be that of F. Lohier a registered nurse currently unlicensed in Pennsylvania. Ms. Lohier's name did not appear on any time schedule.

The problem of poor nursing care suggests that daily rounds by Registered Nurses are not being done and therefore no professional nursing assissments are made. This ultimately results in the practice of corrective rather than preventative medical and nursing

care inadequate supervision and direction of nursing personnel. Such problems as dehydration and fecal impactions are preventable by careful nursing observation and nursing intervention, neither of which is in evidence in this home.

Changes in patients conditions are not noted until those changes have resulted in some acute condition necessitating medical intervention.

In addition to the poor quality of professional nursing supervision the nursing staff is deficient in quantity therefore compounding the problem. It is the contention of the Director of Nursing that the patients are showered and kept clean. That alone is not the only goal of geriatric care. The number of males needing shaves seems to be a result of inadequate staffing.

Nursing personnel other than R.N.'s are oriented by their peers. They were not aware of the meaning of an ADA diet or the significance of "double" on a patient's tray.

The dietary department had glaring deficiencies particularly in the area of therapeutic diets. Of eleven (11) patients on fifth (5) floor ordered to receive therapeutic diets, only five (5) were receiving them. On May 9th the luncheon entree of "sloppy joes" was insufficient in quantity to serve all the patients and other substitutions had to be made. A tube feeding was being prepared with the syrup from canned fruit, milk, and eggs.

Complaints received in the Regional Office about cold food and hungry patients were substantiated.

Observation of lunch being served revealed that food stands on carts from 5 to 25 minutes while nurses aides pour coffee and milk and put condiments on trays. No heating devices are available to maintain warmth.

Upon questioning several patients stated they were often hungry but additional food was never available. Almost every bedside cabinet had supplies of cookies, crackers and candy supplied by families. One (1) male patient refused to offer any comments about the home stating "I'd be a fool if I complained".

Water pitchers were dirty, water was not fresh there was no ice in any pitchers; some patients had no water pitchers or drinking glasses.

Mrs. Baur, a patient on third (3) floor complained to a surveyor about the inhuman treatment and verbal abuse. Several telephone and written complaints have been received in the regional office concerning the treatment of patients in this facility.

The exit interview was conducted with Mr. Thomas, Mrs. Moody and Mrs. Gross. The numerous problems were discussed and the problem of staffing was reviewed. Mr. Thomas and Mrs. Gross stated that obtaining and keeping staff was difficult. Upon questioning Mr. Thomas revealed that he felt personnel policies for nursing staff were poor and felt his own benefits were inadequate. He stated that requests to the corporate office for increased benefits have been denied.

Licensure was not recommended at this time. Mr. Slusser stated that the report of the survey would be turned over to the legal department for action. Both

Mr. Thomas and Mrs. Moody were of the opinion that most of the deficiencies had been corrected prior to the survey. It was the findings of the survey however, that not only new areas of deficiencies but continuing serious deficiencies in nursing. Mr. Slusser pointed out that no request for consultation had been forthcoming from the facility although it had been offered in the letter of April 2.

Mr. Thomas said he would send a formal request for consulation to Mrs. Poppert.

Jun 18 1974

ATTACHMENT 3

June 28, 1974

Summary: Town Court Nursing Center
Survey of June 3, 4, 5, 1974
Provider Number
39-5129

An unannounced survey for the purpose of Licensure, Medicare and Medicaid, was done at Town Court Nursing Center on June 3, 4, 5, 1974. Participating surveyors were Mrs. Barbara Faillace, R. N., Mrs. Madeleine Bowen, R.N., Mrs. Phoebe Somma, R.N., and Mrs Mary Berman, R.N., Mrs. Marjorie Steever, Medicare Validation Officer, Harrisburg also participated in the visit.

The license for this facility expired on March 22, 1974, and no recommendation for licensure has been made by the Regional Office of the Department of Welfare.

Several extensions of time have been granted to Town Court in order to provide this facility the opportunity to come into compliance with state regulations.

On April 2nd, 1974, Mr. Thomas, Administrator received a letter and a list of violations by certified mail. A thirty (30) day period ending May 4, 1974, was granted to correct existing deficiencies. An offer to provide consultation was included in the letter but was not acted upon by Mr. Thomas. Notice was given that the next survey would be unannounced.

On May 9, 10, 15th, an unannounced licensure survey was done and because substantial improvement had not been made in the quality of patient care, no recommendation for a license was made.

On May 24th, 1974, a meeting was held in the Regional Office at the request of Mr. Al Casper of Regional Health Planning. He was accompanied by Mr. Daniel Veloric, President of Geriatric and Medical Centers, Inc., and Mr. John Thomas, Administrator of Town Court. Representing the Department of Welfare were Mrs. Dorothy Poppert, Regional Supervisor, Mr. Cecil Maidman, Attorney for the Department, and Mrs. Ruby Buckler, Miss Roseanne Marsicanno, Mr. Jack Slusser, Mrs. Barbara Faillace, Mrs. Madeleine Bowen, and Mrs. Marjorie Steever, Validation Officer, from Harrisburg.

Mr. Casper and Mr. Veloric wished to present long term plans for Town Court as the corporation has been authorized by Regional Health Planning to begin new construction for the addition of sixty (60) beds. The position was taken by the Department of

Welfare that the immediate needs of Town Court were a priority and demanded immediate correction because patients health and welfare were jeopardized.
Jul 5 1974

Mr. Veloric and Mr. Thomas then requested that one (1) week be granted to bring the facility into compliance.

Therefore on June 3, 4, 5th, 1974, another survey was done. Major deficiencies continued to exist in Dietary, Nursing, Housekeeping, and Administration. The Director of Nurses had resigned and Mrs. Carol Fertig Leonard was Acting Director. She was unqualified to carry out the responsibilities of that position. Staffing was deficient qualitatively and quantitatively Improvement had been made in the charting of medications. Overall quality of nursing care was unacceptable. It was noted that Mrs. Fertig Leonard had written a nurses note stating that a physician had pronounced death at 8:30 P.M. on May 21, 1974. Time cards revealed that Mrs. Fertig Leonard was not in the facility at that time. The death certificate gave the date of death as May 21, 1974; the physician dated his signature on April 22, 1974.

Dietary services were grossly inadequate with food in short supply, cold food, diet errors, and therapeutic diets not being served.

Observation of a fire drill revealed negligence on the part of Mr. Thomas who did not seem aware of how to conduct a fire drill. After five (5) minutes he delegated this responsibility to Mrs. Moody, Administrator. Surveyors posted on all floors noted that

there was absolutely no response at all to the announced drill on 2, 3, and 4th floors. Fifth (5) floor personnel responded inappropriately. Documentation of monthly fire drills was provided by Mr. Thomas.

In conclusion then, from April 2nd to June 5th, 1974, conditions at Town Court have not significantly improved, and these conditions adversely affect the health, welfare, and safety of patients.

It was noted at the time of the June survey that construction of the new addition had begun.
MSB/jct

ATTACHMENT 4

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

Region III

3535 Market Street
Philadelphia, Pennsylvania 19101
September 20, 1976

Office of the
Regional Director
Mailing Address
P. O. Box 13170
Philadelphia,
Pennsylvania 19101
3133

Our Reference: OLTC (1)ew
Mr. Richard Zarin
Acting Director

Division of Licensure and Certification
State Department of Health
Health and Welfare Building
Harrisburg, Pennsylvania 17120

Re: Town Court Skilled Nursing Facility

1526 Lombard Street
Philadelphia, Pennsylvania 19146
Medicare No. 39-5337
Medicaid No. 04-00357

Dear Mr. Zarin:

Our office received a request to investigate a complaint of poor nursing/patient care and improper billing procedures with respect to Medicare patients at the above listed skilled nursing facility.

During the week of July 19 through the 23, 1976, a federal team investigated the alleged complaint and at the same time conducted a complete federal survey of all the health conditions of participation governing skilled nursing facilities.

The findings of the survey substantiate the allegation of poor nursing/patient care. In reference to billing procedures there appears to be some concern and our office will request the Bureau of Health Insurance Integrity Branch to conduct a complete investigation.

The Federal Survey findings are significant in that the following conditions of participation are not met:

405.1122 Medical Direction
405.1124 Skilled Nursing Services

The Conditions of Participation for Physician Services and Dietary Services are marginally met. In addition, the federal findings reveal that many standards and elements throughout the health standards are not met. Moreover, a further investigation needs to be undertaken with respect to medical care rendered at this facility.

The results of the federal survey of July 19-23, 1976, compared with the state survey of April 14, 1976, indicates *serious* and significant differences between the two surveys. The state survey found all conditions, standards and elements met. See the attached federal survey narrative findings.

In accordance with Section 942 of the State Agency Long Term Care Manual, you are requested to conduct a complete resurvey of the Town Court Skilled Nursing Facility immediately. Forward a completely documented survey report form and the appropriate accompanying documents.

Sincerely yours,
(s) Illegible
Robert J. Taylor, Director
Office of Long Term Care
Standards Enforcement

Enclosure

SUBJECT:
Federal Survey Findings
Town Court Skilled Nursing Facility
1526 Lombard Street
Philadelphia, Pennsylvania 19146

Medicare No. 39-5337
Medicaid No. 04-00357
Total Number of skilled beds certified—198
Federal Survey Performed
July 19 through the 23, 1976

Prepared by the Office of Long Term Care, Standards Enforcement, DHEW, Region III.

Narrative Findings

Standards and elements not met including the standards and elements found not met under the Conditions of Participation.

Medical Direction: Coordination of medical care standard (a) F94, F95. There is no evidence that the medical director is involved in the coordination of medical care in the facility. The administrator apparently has attempted to provide some coordination as evidenced by a physicians' staff meeting dated 2/23/75 with four physicians attending and the Medical Director not present. According to the administrator, he initiated the meeting. A memo from the administrator, dated 2/25/76, definitions were established for common terms for patients' conditions such as good, fair, serious and critical, so that when inquiries are made these terms could be used by all; there was no evidence of approval by the Medical Director. The Medical Director has not developed by-laws, regulations, or outlined the responsibilities of the attending physicians. There were no policies/directives with respect to physician services and the provision of services.

Standard (b) *Responsibilities to the facility F98, F99.* The administrator and nursing staff assume the

responsibility for surveillance of the health status of the facility's employees.

With respect to incidents/accidents, there were 106 incident/accident reports reviewed by the Medical Director, with the exception of nineteen. According to the records, the nineteen were dated from 6/7/76 to 7/21/76. The 106 incidents/accidents occurred from the period January 1, 1976.

The situation described above indicates an immediate need to reinforce policies, procedures and to monitor staff and patients in order to provide a safe environment for the patients. At the present time, the facility is revising the incident/accident form and the assistant director of nursing has implemented an on-going study in reference to this problem.

In addition to the above, there is no evidence that the administrator is given appropriate information to help ensure a safe and sanitary environment for patients and personnel.

According to the records of meetings maintained by the facility, the medical director attends the utilization review and the patient care policy review meetings. However, his attendance at the Pharmaceutical and Infection Control Committee meetings raises some concern.

The administrator indicates that the Pharmaceutical Committee meets monthly. The Federal Regulations require at least quarterly meetings. The Medical Director did not attend the Pharmaceutical Committee meetings dated: June 1975, September 1975, February 1976, March 1976, April 1976, May 1976 or June 1976.

With respect to infection control, the administrator stated that the committee meets quarterly; however, the policy of the facility outlines annual meetings. The Medical Director was in attendance on March 3rd and 31st, 1976. There were no other committee minutes.

Recommendation

The medical direction *functions* need to be implemented immediately specifically with reference to coordination of medical care rendered to patients, to prevention of patient accidents, i.e., protection from injury and to provide assurance for a safe and sanitary environment for patients and personnel. The medical direction functions need to be fully coordinated with all other service areas: Nursing, pharmacy, infection control, dietary, specialized rehabilitation, laboratory, etc. The medical director along with the administrator need to review contracts with all the participating hospitals that have entered into transfer arrangements. Temple University, Graduate Hospital, Center City Hospital. Careful policies and procedures must be developed in order to protect both the patient and the facility as it pertains to providing services to patients. There are gross omissions with respect to information from the transferring facility that have the potential for creating a hazardous situation as it pertains to patient care.

Standard (b) is not met. Deficiencies are noted in F 107 and F 109. The following charts have omissions with respect to this standard.

Chart No. 1394, Medicaid admission of June 19, 1976. Old CVA, dehydrated with right sided

paralysis. This patient has an extensive decubitus on the sacrum and coccyx area that has deteriorated and increased in size significantly since admission. The patient is on 24 hours hypodermoclysis solution containing Wydase (medication). Transfer information as of July 23, 1976 has not been received by Town Court. The patient was transferred from Germantown Hospital. Nursing staff members report only a "piece of paper came with patient," (they cannot locate the information for the federal surveyor). The *only* laboratory results is dated July 21, 1976 of the results of the culture and sensitivity of laboratory specimen from the decubitus ulcer—Proteus microbilas. As of July 23, 1976, there is no history or physical examination. There is a medical care plan dated June 24, 1976. However, this contains only diagnosis, discharge plans, etc.

Chart No. 1181 Medicaid admission September 12, 1975, The physical examination was dated *November 15, 1975.*

Chart No. 998 Medicaid admission. There was no physical examination on the patient's record except one dated 10/24/74.

Chart No. 1160 Medicaid. CVA with hemiplegia. The last physical examination was dated July 21, 1975. The laboratory report of February 13, 1976 showed RBC 3.47 (4.6N), Hb 9.9 (14-18), HCT 32.2 (40-54). There are no additional laboratory reports.

Chart No. 1341 Medicaid. CVA with right hemiparesis, pneumonia. The laboratory report dated February 27, 1976, showed Hb 11.6 (14-18) RBC 4.30 (4.6).

Chart No. 1077 Medicare admission of February 6, 1976. Old myocardial infarction—senile. The last physical examination was dated February 7, 1975. The laboratory report dated December 23, 1975—RBC 3.80 (4.6-6.2) Hb 10.2 (14-18) HCT 30.9 (40-54) no follow-up laboratory report.

Chart No. 1161 Admission July 17, 1975, Right Hemiparesis—old craniostomy. Medication order of June 17, 1976:

—Darvocet N 100 mgm q 6 hours prn for pain
— Diazide cap 1 daily
— Tylenol tab 11 g 6 hours
— P.O. Dilantin 100 mgm t.i.d.
— Haldol 5 mgm B.i.d.
— Vitron C tab 1 daily
— Dalmane 30 mgm at HS prn
— Phenobarb 30 mgm in a.m. daily
— Phenobarb gr 1/2 h.s. prn.
— Surfax 240 mgm at h.s.
— Surbex tab 1 6 p.m. if oral medicines refused, sparine 75 mgm, thorazine 50 mgm at H.S.

On June 24, 1976, the physician's progress report read, patient is over-medicated. Heart shows tachycardia, Lungs clear. Slight ankle edema. On 6/24/76, the following medications were discontinued: Thorazine H.S., Haldol b.i.d., Phenobarb H.S. The laboratory findings not within the normal range lacked follow-up reports. A review of the patient's drug regimen might have prevented over medication.

There were ten (10) patients ordered restraints prn., three of these did not indicate the type of restraint to be applied.

Federal regulations require that the physician prescribe a planned regimen of total patient care based on a medical evaluation of the patient's immediate and long-term needs. The medical evaluation of the patient is based on a physical examination done within forty-eight hours of admission unless such examination was performed within five days prior to admission. In spite of the fact the facility's physicians are reviewing the patient every thirty days, there are omissions as outlined in the charts reviewed and cross referenced with the nursing services. Better coordination with physician services should be implemented.

Recommendations

The condition of participation in reference to physician services is marginally met. Moreover, the requirements under Medical Direction have a direct relationship to the problems encountered under physician services.

The facility needs to implement immediately the requirements outlined under medical direction. Closer monitoring of physician services, accident prevention and surveillance of employee health status needs to be significantly improved.

Analysis of Nursing Care—See attachment

A full direct Federal survey was performed at the Town Court Skilled Nursing Facility during the entire week of July 19-23, 1976. The purpose of the survey was to investigate a complaint in reference to nursing and general patient care. Sixty-six (66) records were reviewed in conjunction with direct observations and interviews with patients. Twenty-seven (27) of the Sixty-six (66) charts reviewed, and nursing observations made, raise concern with respect to

some aspect of nursing/patient care. This represents Forty (40) percent of the sample size of Sixty-six (66).

Twenty-three (23) Medicaid—Four (4) Medicare (*i.e., the twenty-seven that have areas of concern*)

The direct Federal survey reveals the following in reference to nursing and patient care:

Of the Twenty-seven (27) records reviewed, there were six (6) incidents of patient falls, one patient experienced two (2) falls (Chart No. 1272). This patient fell on 1/6/76 at 3:30 P.M. (a gash on the top head). This patient fell while going to the bathroom. He was transferred to Presbyterian Hospital and returned at 10:30 PM. On 7/20/76, at twelve midnight, patient fell while getting out of bed. Patient was semi-conscious at the time. Orange juice was given. The Rescue Squad came and administered IV 50cc of Dextrose. Patient responded at once. (No record of vital signs indicated.) On 7/21/76, at 4:30 AM vital signs T 98.6, P-76, -24 and B/P 140/70. A nursing note indicates patient did not eat. The attending physician was notified. 10:30 A.M. physician's note, "abrasions of head, forehead and nose. Quiet respirations. Comfortable. Bedside blood sugar low." One of the six incidents resulted in a patient sustaining a fracture of the left distal radius as noted by the referring physician at Graduate Hospital on 7/15/76. The patient was transferred to Graduate Hospital because of bruising and swelling of the left lower arm. (Chart No. 402.)

In addition to the above concern for patient safety, the review of the Twenty-seven (27) records discloses a pattern of a lack of (1) thoroughness in charting pertinent observations, particularly with respect to observation and healing status of decubitus ulcers. The majority of nurses' notes only indicate if a treatment was done, more seriously observations reveal that (2) nursing assistants are primarily responsible for the special treatments to decubitus, i.e., cleaning, application of topical medications and for foley catheter irrigations including the introduction of medicated irrigating solutions and other special treatments. One particular observation of an aide reveals improper aseptic technique was employed in doing the decubitus care and foley irrigation. Moreover, the aide did not follow the facility's procedure and informed the surveyor that she observed another aide as opposed to receiving instructions and demonstration and supervision from the licensed nursing staff. (See attachment), (3) In certain instances, where it is appropriate, there are omissions in reference to total and types of food tolerated and consumed by some of the diabetic patients and for the one patient who has a large non-healing decubitus. This patient is on IV hypodermoclysis with Wydase added.

All of the above results in a pattern of poor nursing care as it relates to monitoring patients, preventing accidents, careful follow-through of nursing care, lack of direct supervision of aides, assignment to aides of procedures that should be performed by the licensed staff. This pattern of nursing care delivery, particularly the concerns raised in the 27 records, has a potential to jeopardize the health and safety of patients.

An additional occurrence of July 23, 1976 raises further concern, although the charge nurse indicated that it was a very unusual situation. The laboratory technician was late arriving to the floor to obtain the Fasting Blood Sugars from approximately eight (8) diabetic patients. The breakfast trays were on hold. Hot foods, i.e., scrambled eggs and toast were lukewarm to cold when Federal surveyor observed the delay. These trays were not contained in warmers. Patients finally started to receive trays between 9:15 and 9:30 A.M. The laboratory technician completed her activities at 10:10 A.M.

One patient complained later she did not receive a tray.

Based on the above (See narrative attachment) standard (c) of 405.1124 is not met. *It is the pattern of nursing care observed as revealed in the 27 records that renders the condition of Participation 405.1124 not met.*

Patient Identification No.

1. No. 402—Medicaid
   Admission 5/2/72
   Primary Diagnosis: left fracture—neck of left femur (?) ASHD
   Current physical dated 11/9/75

On initial day of survey, Federal surveyor observed an elderly female neatly dressed in a colorful nightgown lying in bed. The patient's left lower arm was bruised and an ace bandage was applied. The left hand was swollen. The patient's arm rested to the side There was no suport, i.e., a sling. The charge nurse indicated the swelling was essentially as it had been on previous days. She indicated the

patient received special soaks and would be followed at Graduate Hospital. On 7/20/76, another Federal Surveyor observed swelling of the patient's left hand. The 3-11 supervisor visited the patient. Indicated the ace bandage was tight. The physician's note of the day also indicated ace bandage was tight. The evening supervisor indicated ace bandage would be adjusted and a sling applied. Next A.M. (approximately 9 A.M.), Federal surveyor saw patient. Patient indicated she bathed self with assistance from the aide, this A.M. Stated she did not eat breakfast, only orange juice. Her complaint was, toast is always a little burnt. Charge nurse observed ace bandage, still applied incorrectly, no splint applied. Aide assigned to soaks. Federal surveyor observed aide and interviewed her in reference to the treatment. The patient indicated aide was doing a good job. Patient was out of bed. On return to facility, at approximately 1:40 P.M., Federal surveyor notified that the patient expired suddenly. The physician indicated as an immediate cause of death, "myocardial failure (heart failure) 5-10 minutes and arteriosclerosis 2-3 years." He also ordered an autopsy. The evening supervisor informed the Federal surveyor that an autopsy is not performed when natural cause of death is listed. The attending physician was not available; however, a message was given regarding this.

Review of record reveals the following:

7/11/76

Patient's left hand is edematous. Physician's answering service called. Physician ordered hand soaks in Epson solution.

7/11/76

Verbal order taken by RN and signed by the physician. Soak left hand in 2 tsp. of Epsom salts to one pint of water three times a day. Keep hand elevated.

7/12/76—Physician's note:

"Patient presumably fell one week ago and injured left hand, no tenderness—no chills—fever. Soaks ordered" (NOTE: some words in this notation cannot be discerned by the Federal surveyor).

7/12/76—Nurse's note:

7-3 shift, left hand swollen, soaks to left hand done, visited by physician.

3-11 shift, left (hand) soaked, as ordered, with normal saline solution. (On 7/12/76, physician ordered normal saline solution soaks.)

7/13/76

7-3 shift, left hand still swollen, soaks, hand elevated in sling.

7/15/76—Physician's note:

Hand swollen, but less. Sling ordered. Burrow's solution.

7/15/76—4:30 P.M. Nurse's note:

Message left at relative to inform them of fracture. 3-11 Patient returned from Graduate Hospital 7/15/76 written on prescription sheets. Not signed by referring physician. Physician's name was contained in content of order, i.e., in reference to who to notify if there are problems.

7/15/76—Nurse's note:

"Patient transferred to Graduate Hospital via cabulance at 3:15 P.M. Returned at 5:25 P.M. No apparent distress."

Prescription sheets (2) state:

(1) distal radius fracture non-displaced
(1) encourage finger motion
(2) Check neuro vascular status regularly left hand
(3) remove ace bandage daily to care for skin on dorsum of forearm
(4) call Dr. Kimbin? if any questions
(5) to be seen in 2 weeks

7/16/76—Nurse's note:

"Patient's arm still swollen, denies pain. Bruising throughout forearm to the elbow. Encouraged to move fingers. Ace bandage removed and rewrapped. Patient's fingers checked, feels pain, color good, warm to touch, nail beds, appears normal," etc.

Treatment to lower left arm not recorded by Nursing Service on 7/16/76

7/18/76—Physician's order:

Sling to left hand
x-ray, D/C Saline soaks
Use Burrow's solution

7/20/76—Physician's note:

"Splint seems to suffice . . . swelling—wrist, ace bandage too tight"

7/20/76—Nurse's note:

Patient's arm swollen, (better) no complaint of pain.

7/21/76

Federal surveyor saw patient in A.M. Wrist swollen but less than 7/20/76. As noted in afternoon, ace bandage not applied correctly. House supervisor removed and asked aide to bathe and apply

treatment. Federal surveyor briefly observed patient receiving treatments this morning.

7/21/76—No time listed—Nurse's note:
Patient found lying down—unresponsive VS P(0), R(0), B/P (0), Temp. 94, Dr. notified

7/21/76—1:30 P.M. Physician's note:
Patient expired 1:30 P.M.
Autopsy ordered
Death Certificate signed
Immediate cause of death Myocardial failure 5-10 min.
Arteriosclerosis 2-3 years
Federal surveyor notified by 3-11 supervisor that State does not perform an autopsy when natural causes are given for death.

Incident form dated 6/24/76
The appropriate blocks in reference to notification of physician not checked. Vital signs, 98T, P-70, R-no record. Description of incident, laceration on arm, 2nd bruised spot on left knee. Treatment, ice pack given; placed on left knee and left arm, dressing after cleansing with hydrogen peroxide. Question on form: How to prevent accident. Response from aide: "We cannot because patients are subject to falls," signed by floor nurse and Director of Nursing, not by Medical Director.

2. *No. 1317—Medicaid*
Admission 2/13/76
Chief Complaint—Chronic UTI
Primary Diagnosis: CVA, Chronic Brain Syndrone
* Poor mouth care
* Good care plan

3. *No. 1408—Medicaid*
Admission 7/15/76
Chief Complaint—Recurrent GI bleeding, lower abdominal cramps, severe anemia

Physician's note: Severe anemia 2° GI bleeding aggravating a known refractory anemia due to bone marrow failure. H & H stabilized at 8-9.

7/20/76—Nurse's note: . . . "Patient sustained fall to the floor, no evidence physician notified
Lab results 7/20/76
RBC 3.37 L
Hg 9.7 L
Hct 29.5 L

Doctor notified of results 7/22/76"
In bed when Federal surveyor went with charge nurse to observe patient.
Good Care Plan

4. *No. 1064—Medicaid*
Admission 1/7/74
Note 7/15—Patient fell from wheelchair, T 98, P-60, R. 18, B/P 130/70. Supervisor notified. No documentation in reference to notifying physician.

5. *No. 1352—Medicaid*
Referred from home
Date of Admission 3/24/76
Diagnosis: Diabetes, CVA
Review Lab results:
7/3/76 Glucose 82
4/9/76 Glucose 63
7/16/76 Glucose 170 High
On a 1500 ADA diet

There are notations in reference to feeding and assisting with meals, no description of diet tolerance or consumption.

6. *No. 1135—Medicaid*
Admitted 5/20/75
Admission physical examination 11/5/75
Diagnosis: Diabetes Mellitus
Nurse's notes reveal:

6/8/76
Patient took milk and crackers—urine negative with trace of acetone, still feels weak—encouraged to take fluids.

6/8/76 patient feeling much better, ate entire serving of diet supper, would like to have soup at supper, notation for dietitian.

6/8/76—4:30 P.M. insulin held because of complaint of weakness and dizziness.

6/26/76—1600 ADA 1/5, 2/5 including 3 P.M. snack, 2/5 including hs snack

6/30/76—Complaint of weak and dizzy. Patient got up from chair, attempted to get to bed, slipped and fell to floor. No visible injuries. No complaint of pain. Vital signs B/P 180/90, T-98, P-76, R-20 awaiting for physician to return call.

9:20 P.M. telephone call from physician, stop all medication, will see patient tomorrow.

No apparent distress.

7/1/76—Patient weak, dizzy
Doctor examined patient, to remain in bed today, all meals stopped.

7/1/76—Patient lethargic and pale, B/P 160/80-80-20
Doctor notified. Additional insulin dosage given.

7/5/76—FBS 156, physician notified

7/8/76—insulin changed per assessment and visit by physician.

7/12/76—physician notified of increase in Blood sugar, insulin increased by physician.

7/19/76—FBS 152

7/21/76—insulin reaction noted, VS 166/120-98-20 OJ and sugar P.O. time not noted by licensed nurse

7/21/76—3-11
"Patient appears drowzy, lying in bed most of shift. Ate good dinner. Statement of patient (patient feels better) insulin given by supervisor this evening."
Chromology of Lab studies:

6/25/76 Fasting Glucose 162

7/ 2/76 Fasting Glucose 156

7/ 9/76 Fasting Glucose 204

7/16/76 Fasting Glucose 152

No Registered Dietitian's notation on chart in reference to diet tolerance or consumption or if any problems discerned.

Patient apparently unstable with respect to Diabetes.

On Patient Care Plan there is a notation in reference to nursing approach to Diabetes.

"Patient to give own insulin—reinforce technique in class."

There is no current physician's order regarding this although there was an update of plan, July 2, 1976.

7. No. 952 Type 2

Admission 5/20/75

Current Hx and physical examination 5/21/76

From current information: Diagnosis: Bilateral A/K amputation, Glaucoma, Diabetes Millitus

* Nurse's note:

7/16/76 by RN "Patient has not had an eye examination *2 years*. Federal surveyor questioned nurse regarding this.

Eye appointment has been scheduled for August 13, 1976.

8. No. 1402 Medicaid

Admission 6/20/76

Diagnosis: Congestive heart failure

Diabetes

Has decubitus on admission

Location: Left hip, 1 cm in diameter—approximately inch, healing.

Aides responsible for treatment to the decubitus and left stump area.

Treatment to decubitus: Paint on left hip with 5% mercurochrome, allow to dry. Apply BFI powder bid.

Aide applying topical medications. Indicated she received no instruction with respect to treatment.

Aide used H_2O_2 solution used for other patients. Poor technique, held bottle opening close to decubitus while pouring solution to clean skin area.

When aide turned patient, sheets very ruffled, crumbs in bed, spoon under patient, coffee cup dirty with deep staining. Aide indicates she usually checks

cups before serving, but forgot this one. Indicates kitchen sends cups up like this one frequently.

On physician's order sheet there is an order between dates of 7/7/76 and an order of 7/21/76 for weekly FBS unless otherwise ordered. 7/2/76 FBS 140 high. There are no other FBS results on record.

There is an R.D. notation 7/20/76—1500 cal. ADA pureed diet, must be fed, appetite fair.

9. No. 1394—Medicaid

Admission 6/19/76 from Germantown Hospital.

No transfer information received.

Admission note by LGPN 6/19/76—"Received patient this PM from Germantown Hospital via ambulance. Dehydrated OLD CVA with right paralysis, vital signs taken.

Decubitus on Sacrum/Coccyx, left heel.

House supervision indicates decubitus twice size since admission. A heel cushion is applied.

Description of Decubitus on Sacrum/Coccyx low spine.

Approximately 2 inches in diameter and 1½ inch deep. No signs of healing, outside tissue red, inside decubitus tissue has grayish/whitish appearance.

Result of recent C & S of decubitus Lab report verbal, 7/21/76. Proteus Mirobilas S-Senitive Kanamycin and Ampicillin. Physician ordered Ampicillin 500 mg. q 6°.

There is no complete Hx, PE on record. The only lab report is the above listed report of 7/21/76, it was ordered 7/17/76. Patient previously on Keflin 1.5 gm. Im q 6° as of 7/17/76. I/O is recorded

and food consumption is described in terms, appetite fair. Nothing recorded by RD about diet intake as it pertains to protein consumption. Nothing recorded in reference to type of foods consumed. Nurse's notes do not contain a good description of status and degree of deterioration of the decubitus. The decubitus is not healing. Patient receives over 24 hour daily hypodermocylsis solution. Federal surveyor observed the aide perform the treatment for this A.M.

Decubitus care applying topical medications, and the Foley catheter irrigation, consists of Neosporin Solution. Aide indicated no licensed staff demonstrated treatment, that she observed another aide.

Poor technique observed, especially with respect to prevention of cross contamination. Aide used thin plastic glove, cleaning feces continuously, changed to do care to decubitus; however, aide proceeded to irrigate foley with same gloves after decubitus care. (See attached.) Technique not in accordance with facility's policy/procedure.

Federal surveyor suggested she wash hands, aide complied with request, poor technique in reference to Foley irrigation as it relates to promoting asepsis. Tube draped over thigh, thus not effecting good gravity for return of irrigating solution. Using medicated solution to irrigate Foley, Neosporin.

No assessment by RD since admission Hypo dermocylsis: 2.5% in ½ PSS with 150u Wydase. On a soft to bland as tolerated.

* Cardex diagnosis bladder infection listed—Federal surveyor cannot discern this in physician's notation.

Nothing in Care Plan in reference to problems and approaches to decubitus care. Statement on Nurse's notes indicate only decubitus care as ordered.

Additional notes:

7/11/76—Nurse's notes:

9:15 P.M. Patient perspiring freely, pain where hypodermocylsis inserted, vital signs; T-102 (R), P-100, R-36, B/P 118/60

10:00 P.M., T-103 (R) 10:55 P.M. physician returned call.

Tylenol gr x q.i.d. ordered.

7/12/76—Visited by physician in A.M.

7/17/76—Physician's note:

"Sacral decubitus is quite large and odorous.

Irrigate decubitus with clorox solution, diluted 1 pint to 9 pints water tid. Keflin 1.5 gm q 6° IM restore hypodermoclysis to thigh, add wydase amp. to each IV."

Nurse's notes do not reflect description of urinary irrigations. Federal surveyor cannot discern any C & S on a urine specimen.

See attached in reference to Foley irrigation procedure.

10. No. 1183—Mediciad

Admission 9/12/75

Diagnosis: Benign Prostatic with Hypertrophy
Bladder Calculus

C. C. Incontinence

Has Foley catheter

Teeth on P & E very poor condition, mostly gone, few remaining—bad condition.

* No additional dental follow-up

During week 7/19-7/23/76, patient having problem with catheter.

Physician in and changed catheter, and placed patient on I/O during afternoon of 7/22/76. Charge nurse for day initiated order; however, it was not implemented.

Federal surveyor brought order to attention of charge nurse on 7/23/76 at 10:30 A.M. She immediately checked the situation and implemented order written by physician, approximately 18 hours after.

* There is nothing on Patient Care Plan in reference to urinary problems.

* There is a physician's order for Valium 10 mg *IM* prn, 1 hour prior to obtaining blood for lab work. Transcription omits route of administration, i.e., IM

11. 1181—Medicaid

Diagnosis: Diabetes Mellitus, anemia,

Paranoid Schizophrenia

Admission 9/12/75

Physicial examination not done 48 hours of admission or within 5 days previous to admission. P & E performed 11/15/75.

* Omission in transcribing a medication order:
Thorazine concentrate 30 mg. PO bid

* Sparine 50 mg. if refuses Thorazine
Sparine 50 mg. IM q 12o prn

12. No. 1272—Medicaid

Admission 11/19/75

Diagnosis: Obstructive Emphyzema, ASHD

? diabetes, pyelitis

Federal surveyor observed a very thin W/M lying in bed. Very weak during tour of survey.
Several accidents have occurred:

7/5/76—3:30 P.M.

"Fell while going to bathroom with gnash on top of head.

Condition of patient lethargic. Medical Director called.

Patient sent to Presbyterian Hospital and returned at 10:30 P.M. that evening."

7/20/76—During 11-7 shift:

12 P.M. "Patient was apparently getting out of bed, had accidentally lost his balance and fell down with his face down to the floor. Was semi-conscious at that time. OJ given. Rescue squad came and administered IV 50cc of Dextrose. Patient responded at once." (No report of vital signs)

7/21/76—7:30 A.M.

VS; T-98.6, P-76, R-24, B/P 140/70

Alert and cooperative

No signs of difficulty this A.M.

Skin warm and dry, color good

Denies pain or discomfort, confused.

Two inch laceration scalp—closed

Bruise—forehead

Took a small glass of orange juice

Dr. Hand notified

10:30 A.M.—Physician's note:

Abrasion of head, forehead, nose

Quiet respiration, comfortable,

Bed side sugar low

Note last FBS dd 3/18/76 (88)

11:30 P.M.—Same day, nurse's note:

Charge nurse suspects hypoglycemic reaction. Dr. Hand notified. RD has not been in to assess patient.

13. No. 1327—Medicaid

Admission 2/19/76

Diagnosis—CVA, Aphasia

Per physician's note 2/19/76 "patient quite debilitated, will start on physical therapy. Decubitus RT hip, left hip and left buttock. Not ascertained if decubitus were present on admission.

Physician was informed by nursing that decubitus not healing. C & S ordered. RT hip. No report as yet.

Ordered 7/20/76.

Physician's note of 7/19/76:

"Called to see patient because of non-healing of decubitus, physical shows decubitus not as clean as it should be, cultures taken, and *nursing instructed about the cleaning of decubitus.

From 7/11/76-7/19/76, there is no accurate nursing description of status of this decubitus. Aide applying treatment—ointment. Right hip decubitus—diameter of a "25 cent piece" Left hip—approximately 1 inch in diameter—skin breakdown. Aide assigned to decubitus care.

Patient on I/O—chart—Doctor's order 1500 to 2000 cc/d omitted on 7-3 shift.

Care Plan needs update—contains notation has a foley—patient does not have a foley catheter. Patient receives PT.

Nurse's notes omit any notation re ROM exercises.

Foley during initial time of admission—April, May, 1976—

Federal surveyor could discern no order.

14. Chart No. 1322—Medicaid

* Federal surveyor spoke with patient on 7/20/76. He shared fact he fell out of bed, sustained a large black and blue bruise on back, approximately 3 inches in diameter, size of large grapefruit. Federal surveyor brought this to the attention of 3-11 charge nurse. She observed it immediately, indicated patient fell on 7/19/76, but he did not tell anyone.

Federal surveyor feels this should be detected during routine back care of this patient.

Physician to the patient 7/23/76. Physician had been in to see patient on 7/21/76 and patient did not inform him.

* Physician ordered Elixir Terpin Hydrate drams 1 q 3 hours with codeine 7/21/76. Not transcribed by charge nurse on day tour.

Federal surveyor shared this with charge nurse on evening.

Order noted immediately.

15. No. 1388—Medicare

Admission 5/28/76

Diagnosis: Parkinson's Disease involving left extremity

Review of physical therapy notes reveals services rendered: 6/22/76, 6/24/76, 6/25/76, 7/1/76, 7/6/76, 7/6/76, 7/7/76, 7/12/76, 7/15/76, 7/20/76, 7/21/76.

Patient evaluation conducted 6/3/76.

No discrete progress notes recorded from 6/22-7/21/76. Only date and RPT signature. Nurse's notes do not reflect any ROM exercises in conjunction with physical therapy.

16. No. 983—Medicaid

Current physician orders indicate PT and ST, no ST is given.

Diagnosis: CVA, Anemia

A recap of orders done by licensed nursing staff and physician signed "July recap."

RPT notes 5/20/76, 7/9/76, 7//13/76, 7/20/76 contain date and signature, no status report.

17. Chart No. 11—Medicaid

Admission 9/7/72

4/1/76 current P & E & Hx

Diagnosis: ASHD, renal insufficiency

Dental

Physician has indicated lower loose tooth, poor teeth condition, no dental follow-up. Patient has decubitus—developed while in nursing home.

5/20/76—Physician's note:

Called by nurse about decubitus getting worse, debrided and dressed.

7/1/76—Progress note by physician:

Decubitus healing.

* Decubitus ¼ inch deep—buttock area. Patient on B/B training. No nurses note re status. Decubitus care rendered by aide.

18. No. 1343—Medicare

Admission 2/29/76

Referred from Graduate Hospital

Adm P & E & Hx dated 3/1/76

* Physician Services

Federal regulations require this to be done within 48 hours of admission or within 5 days of admission from referring source.

2/19/76—Nurse's note admission:

"Patient admitted via stretcher from Graduate Hospital at 3:00 P.M. Foley draining well. Vital signs taken and noted.

No transfer information

CC Poor appetite

Neoplasm of head of Pancreas, MS

No decubitus on admission

Decubitus noted 5/25/76—size of dime—reddened area. Appears to be healing. There is no reference to Hepatitis—No evidence special precaution. This may be chronic due to diagnosis of CA of Pancreas?

On high protein and cheese

Patient has not been eating well—only RD note found—7/23/76

New dietitian has been hired. She visited patient this date.

19. Chart No. 122—Medicaid

Admission 6/2/70

5/1/75—current Hx and P & E due for 76 annual P & E

Diagnosis—post fracture—shoulder of hip

* 7/21/76

. . . "fell on floor, 9:45 P.M. Patient found lying on floor on back. Physician not in to see patient. Licensed nurse gave Valium 2 mg.

There is an order for this—Federal surveyor cannot discern physician's input after fall.

On 7/23/76

Approximately 8 diabetic patient's had hold trays. Many on insulin, which was also held.

Several patients complaining.

Lab work completed approximately 10:10 A.M.

Lab Technician started approximately 9:40 A.M.

All trays were cold—scrambled eggs, toast, coffee—one patient indicated that she never received tray—this was some time past 10:10 A.M.

* Federal surveyor observed no proportionate difference between 1500 and 1800 diabetic diets for breakfast meal. Same amount of juice, milk, bread.

Nursing

No. 998 Medicaid—On 7/1/76, physician ordered force fluids.

No evidence of fluids being forced except for a notation 7/4/76 by the night nurse which stated fluid forced. There was no indication of the amount.

* This patient was also sent to HMCH by mistake, the note from HMCH, dated 7/8/76, so indicated.

No. 1360 3/31/76 Medicaid—CVA right side Hemiplegia. This patient was observed with mittens on both hands, had poor posture, restrained, and in need of mouth care.

No. 1160 Medicaid 7/75—CVA—Hemiplegia.

On the day patient observed, generally not neat and in need of shaving, skin dry, badly in need of mouth care.

No. 1405—7/8/76—ASHD Diabetic—1200 cal Req—Decubiti observed on adm. The nurses notes

did not adequately describe decubitus areas. Areas on both heels necrotic.

No. 1341 Medicaid—CVA right Hemiparesis

On 7/17/76, intake and output ordered and fluids to 1500 cc/day—no evidence of this order being carried out. The patient also had foul breath odor

No. 857—Medicaid—Osteoarthritis of hands.

This patient had an order to force fluids, there was no record of intake.

No. 1096—Medicaid—3/12/75—Abdominal Aortic Anuresym

ASCVD order to be weighed daily, not recorded.

No. 1019 Medicaid 10/2/74—CVA c right Hemiparesis Epilepsy.

Treatment shows Foley irrigated weekly. There was no order for this treatment. Elase to Decubitus, no recorded nursing observation of decubitus.

General observations:

Nursing Care Plan did not reflect accurately patient needs. Revisions were not made as needed.

More registered nurse supervision is needed for employees providing care to patients on the third floor.

Once restraints are applied, there is no evidence of monitoring restraints. There were no observations recorded [illegible] patients restrained except the notation that the patient was restrained.

Attachment in reference to No. 1394
Foley irrigation procedure
Foley irrigation
Contents
Plastic Drainage Tray
Plastic Graduate

Plastic Bulb Irrigating
Syrene 50 cc
Cotton Gauze 4" x 4"
Plastic Coated Towel
Graduate Cover
Syringe Tip Protector (omitted from procedure)

Procedure

1. Snap bag open and remove tray.

2. Position patient and place plastic bag on bed to be used as a waste receptable.

Patient not positioned correctly to effect drainage solution flow by gravity. Patient on left side, foley tubing draped over thigh.

3. Remove tray cover, either by sliding tray out of sleeve, or tearing sleeve at tear spot, depending on technique. Place plastic backed paper towel, absorbent side up, under patient.

4. Grasp outside graduate w/lid, containing syringe, remove and stand graduate upright to maintain sterility of inner surfaces. Remove syringe and place in tray to protect sterility. Prepare irrigating solution/MD's order—Solution already prepared—Neosporin Solution—Medication—

Irrigation by aide

5. Remove syringe protector and place on drainage tube connection to maintain tube sterility during procedure, before proceeding with procedure.

Not done, no tip protector, tubing end placed on sheet.

Aide proceeded to go from decubitus care to catheter irrigation. Federal surveyor suggested that she wash hands before proceeding with procedure.

6. Place syringe in solution and slowly depress bulb then release, to fill syringe. Proceed with irrigation, observe aseptic technique, collect irrigation, observe aseptic technique, etc.

Record findings in nurse's notes. Aide did procedure, only initialed a special Rx sheet.

Standards, elements not met under nursing

Standard (b) Charge nurse. *Elements* 130 and 132 are not met.

The administrator, on occasion, has assigned the Director of Nursing as charge nurse.

Federal regulations require that the charge nurse is to be designated by the *director of nursing services* for each tour of duty. Moreover, the director of nursing cannot serve as a charge nurse in a facility with an average daily total occupancy of 60 or more patients.

Standard (c) *Twenty-four hour nursing service is not met.* Elements F 135, 136, 137 have deficiencies. (See the narrative report)

Standard (d) Patient Care Plan is not met.

Thirty-two (plus) care plans were reviewed. Fifteen of the care plans lacked some items that are required by Federal regulations. The majority did not indicate the coordination of other services, i.e., dietary, physical therapy. The majority of care plans contained only the nursing aspect of care. In a few instances, care plans were not completely in accordance with physician orders. The revisions did not indicate changes in patient status. Omissions were observed in the care plans of following chart numbers: No. 1402, 1064, 402, 1135, 952, 1394, 1183, 1272, 1327, 1388, 122, 1398, 1158, 1414, 1406. (Care plans of patients on the fifth floor at Town Court.) In addition, the

general observation with respect to care plans on the fourth floor reveals nursing care plans did not reflect accurately patient needs. Revisions were not made as needed.

Standard (e) Rehabilitative nursing care is not met.

Deficiencies are noted in the following areas: Documentation is inadequate with respect to ROM exercises performed by nursing as an extension of physical therapy. In some instances, there is no documentation with respect to patient progress in progressing in activities of daily living. There are references to bowel and bladder training.

Standard (f) Supervision of patient nutrition is not met.

In reference to the diabetics and in other special instances, nursing does not record adequate type of foods consumed and notification to dietary with respect to problems. The RD started documenting on patients' records on 7/20/76. Previous to this, the Federal team could not observe dietary input. A new dietitian was hired 7/23/76, thus some of the dietary concerns may be resolved. On one record, the physician ordered an Intake and Output; however, the charge nurse had not transcribed the order until reported by the Federal surveyor the next day. This was uncovered by review of the patient's chart. (Cross reference with dietary services deficiency list.)

Element (F 190) under Standard (h) Conformance with physicians' drug orders. In certain instances, medication orders were not transcribed correctly or promptly. (See the nursing narrative.)

Element (F 206) under Standard (i) Storage of drugs and biologicals.

The emergency drug box is not kept readily available. It is located in a locked closet on the second floor exit stairwell. The supervisor on duty is to be called if the emergency box is needed. The June 29, 1976 pharmacy report indicates separate emergency drug boxes are to be housed and accessible on each unit. As of July 23, 1976, this had not been done. The Director of Nursing informed the surveyor that this would be completed during the week of July 26th. The deficiency is cited to insure appropriate follow-up.

24

Census 194

Staffing, Nursing Hours Per Patient Per Twenty-four Hours

Work Week Begins Thurs.
Ends Wed.

Date	Nursing Hours/Patient Per 24 hours		No. of Nursing Personnel	No. of Hours Per Day	DON	Asst. DON
July 1, 1976	(Thurs)	2.14	52	416	not included	included
July 2, 1976	(Fri)	2.18	53	424	not included	off
July 3, 1976	(Sat)	2.14	52	416	not included	off
July 4, 1976	(Sun)	2.18	53	424	off	included
July 5, 1976	(Mon)	2.22	54	432	off	serves as DO not included
July 6, 1976	(Tues)	2.18	53	424	not included	included
July 7, 1976	(Wed)	2.35	57	456	not included	included
July 8, 1976	(Thurs)	2.26	55	440	not included	not included
July 9, 1976	(Fri)	2.30	56	448	not included	not included
July 10, 1976	(Sat)	2.18	53	424	off	off
July 11, 1976	(Sun)	2.22	54	432	not included	off
July 12, 1976	(Mon)	2.35	57	456	not included	not included
July 13, 1976	(Tues)	2.14	52	416	off	F132 deficien included charge on C-2
July 14, 1976	(Wed)	2.39	58	464	off	" "
July 15, 1976	Thurs)	2.35	57	456	not included	included
July 16, 1976	(Fri)	2.38	59	472	not included	not included
July 17, 1976	(Sat)	2.47	60	480	off	off
July 18, 1976	(Sun)	2.38	59	472	off	off
July 19, 1976	(Mon)	2.58	64	502	included DON charge on 2 F132 deficiency	states she is DON today?
July 20, 1976	(Tues)	2.88	65	560	not included	not included
July 21, 1976	(Wed)	2.88	65	560	not included	not included

Recommendation—Nursing Services

1. Licensed nursing staff be assigned to the special treatments, i.e., decubitus care that require topical medications, foley catheter irrigations, other special treatments.

2. Licensed nursing staff need to improve in describing the status, i.e., healing or deterioration of a decubitus ulcer and not just a recording that a treatment is done. On the majority of instances, on the day tour, the aides performed these special treatments.

3. Licensed nursing staff need to closely supervise aides to ensure proper care. This can be accomplished via direct supervision and increasing rounds on certain patients.

4. The facility should conduct a study in reference to care of decubitus and prevention of decubitus.

The following is noted:

The administrator is attempting to address the problems in nursing. This is demonstrated in his hiring of a new director of nursing and assistant director of nursing, February, 1976. The facility is attempting to recruit more licensed staff. The director of nursing indicates there are eight (8) licensed staff vacancies: 2 RN's and 6 LGPN's. The administrator has initialed the following:

Daily schedule of rounds:

Administrator/Director of Nursing—3rd floor
11 A.M. Mon.

Administrator/Director of Nursing—2nd floor
1 P.M. Tues.

Administrator/Assistant Director of Nursing—5th floor—2 P.M. Wed.

Administrator/Assistant Director of Nursing—4th floor—10 A.M. Thurs.

The facility has combined the recording of physician and nursing progress notes.

On March 19, 1976, a notation was made by the Administrator, "to date, there has been a poor amount of follow-through in providing quality nursing care. To be remedied today. Each of you (referring to the Director of Nursing and Assistant Director of Nursing) are expected to check each chart each week on your respective floors to ensure accuracy, completeness and that physician's orders are carried out." Four months have passed and in the review of the 27 records, the problem of a "poor amount of follow-through" continues. Particularly in those areas outlined in the proceeding paragraphs.

In addition, the Federal surveyor learned through an interview with the Director of Nursing that both, she and the Assistant Director of Nursing, report to the administrator. This may create a problem in central decision making in nursing. The facility should review this and clearly appoint a Nursing Director who has central authority.

This interview reveals that the administrator, on occasion, has assigned the Director of Nursing to be charge nurse on Floor C-2. Under the requirement for charge nurse, F130 states in part: ". . . a registered nurse, or a qualified licensed practical nurse (vocational) nurse, *is designated as charge nurse by the* Director of Nursing Services for each tour of duty. The Assistant Director of Nursing would be more appropriate to designate if the additional nurse were

needed. In addition, Federal regulations require that the Director of Nursing does not serve as a charge nurse in a facility with an average daily total occupancy of 60 or more patients.

One of the surveyors provided some possible insight regarding this. The Administrator is evaluating the current Director of Nursing as it pertains to her performance as the Director of Nursing. This can be accomplished without jeopardizing her current responsibilities, i.e., not assigning charge nurse responsibilities. Note, the Director of Nursing was assigned charge nurse on C-2, the initial day of the survey.

The facility had the Registered Dietitian review patients in reference to dietary. On 7/20/76, notations were made. Federal surveyor could not discern any previous notes on the current records. On 7/23/76, a newly hired dietitian was observed making rounds.

The Administrator asked Federal surveyor for reference concerning nursing audits.

Dietary Services 405.1125

Standard (a) Staffing is not met.

Deficiences are noted in F210, F211 and F213. The survey reveals that although the facility has contracts with two ADA's the frequency of visits is not enough for this facility. Moreover, considering the size of the facility and the type of diets required, increased dietary personnel is necessary.

Please note that Federal surveyors observed the dietitian documenting in patient records on July 20, 1976. Previous to this date, for the majority of patients on special diets who would need some follow-up, there was no documentation or visitation by the con-

sultant dietitian. The dietitian has been ill and the facility hired a new dietitian on July 23, 1976. The dietary consultative activities need monitoring to ensure that the dietary needs of patients are met.

Please see the nursing narrative with respect to the current omissions of dietary. For example, a particular situation occurred to an individaul patient: Chart 1313 Medicaid, admission 2/3/76. Diabetic—Hemiplegia, Left CVA. The physician ordered on June 17, 1976, "please have dietitian review patient." Progress notes also indicate that a dietary request has been made as of June 18, 1976.

A nursing progress note to the physician indicates the administrator stated that "when he gets a dietitian, the resident may have a conference with him." On June 30, 1976, the patient continued to complain of being hungry all the time. The patient has gained twenty pounds. On July 4, 1976, nursing progress record showed that the patient is still complaining of being hungry. Nursing service requested the dietitian to speak with this patient, but as yet this had not been accomplished. The notation indicates I am sorry that the patient is hungry. On 7/13/76, patient is complaining. On 7/23/76, this patient was seen by the newly hired dietitian.

Standard (b) Menus and nutritional adequacy is not met.

The survey reveals that although menus are planned they are not implemented.

Standard (c) Therapeutic diets is not met.

Deficiencies are noted in elements F224 and F225, the survey reveals that the diets indicated in dietary and those on the floor do not agree.

2nd floor	
Regular	17
Diabetic	2
Low Na.	4
	24
3rd floor	
Regular	31
Soft	4
Puree	1
Diabetic	12
Low Na.	10
	58
4th floor	
Regular	37
Soft	3
M/S	2
Puree	3
Diabetic	9
Low Na.	4
	58
5th floor	
Regular	25
Puree	2
Diabetic	16
Low Na.	9
	52

The fifth floor staff nurses indicated nine diabetic diets. A better system of transfer of information about diets must be established.

Standard (e) Preparation and service of food is not met.

Deficiencies are noted in elements F238 and F239. The survey reveals due to the lack of well trained staff, food is prepared without consideration for attractive looking meals, nor are substitutions made appropriately. Work assignments are not implemented in this department.

Element under *hygiene and staff* (f) is not met, F242. Food handling techniques observed are poor.

Element under *sanitary conditions* (g) is not met, F247. The area for storage of waste was dirty and not acceptable. Individual diet cards are dirty. Refrigeration in the storage area is dirty. The dietary condition of participation is marginally met.

Specialized Rehabilitative Services

Element F258 under Standard (b), plan of care is not met. The survey reveals that treatments are recorded regularly; however, patient progress is not recorded.

Pharmaceutical Services

Element 268 of Standard (a) Supervision of services is not met. The pharmacist indicates to the administrator that he reviews each patients' drug regimen. However, the notation made on each cardex is not an acceptable signature. Some type of symbol is made and it is not discernible. Moreover, many of the medication and charge nurses did not recognize the symbol.

Through OLTC, formerly ONHA (policy directive), the monthly review of the patient's drug regimen is to be noted by the Registered Pharmacists on the patient's individual medical record. This can easily

be accomplished by noting in the margin of the physician's drug orders and a clear signature with the title R Ph. Medical records standards require that a signature and title be given for licensed health practitioners and also when non-licensed staff record observations, etc., i.e., Mrs. Ann Jones, nursing assistant.

Element F281 under (d) Pharmaceutical services committee is not met.

The survey reveals that the medical director does not meet with the pharmaceutical committee at least quarterly.

30

Not Met	Findings	Recommendations
Lab & X-ray 405.1128 (a) Provision for Services Factor not met	In one record of 23 reviewed, 12 lab tests were done and charged to Medicare. There were no doctor's orders for these tests. In another record of 23 reviewed, 8 lab tests were done with no doctor's orders and, likewise, billed to Medicare.	Policies and procedures stating that services are provided only on the orders of the attending physician were available, but should be enforced. The OLTCSE should notify the intermediary of these two cases (Case Numbers 1306 and 1267
Dental 405.1129 (a) Advisory Dentist Standard not met	Last in-service (Mouth Care) was conducted 6/4/75. No indication from staff or written documentation that advisory dentist recommends oral hygiene policies and practices for the care of patients	In accordance with the dental agreement and polici the administrator and medic director should assure that the dentist provides in-service and recommends oral hygiene policies and practises as appropriately needed.
(b) Arrangements for outside services-Factor not met	Name and phone numbers of dentists was not documented in patients' medical records nor were lists and phone numbers of dentists available at nurses' stations. The facilit does have an agreement with Graduate for dental services and this number is available at nurses' stations.	Self-explanatory
Social Services 405.1130 All standards met (b) Staffing	Agreement with qualified social worker signed 7/23/76 by administrator and social worker. According to the administrator, the social worker will begin duty 7/24/76.	As with all health deficiencies found on this validation survey, OLTCSE should monitor carefully to assure that the qualified social worker provides required services.

Physical Environment 405.1134

Elements F384, F385, F388, F389 under Standard (c) facilities for the physically handicapped are not met.

The survey reveals that there are insufficient water fountains and public telephones of average heights. There is no provision for the blind to identify rooms, facilities and hazardous areas. The facility does not provide audible and visual warning signals.

The surveyor needs to determine if the latter requirement is waiverable. All deficiencies are to be corrected.

Infection Control 405.1135

Element F446 under Standard (d) linen is not met. The survey reveals that ventilation in the soiled linen room is not adequate.

Standard (e) Pest Control is not met.

Roaches were seen on the fourth floor and third floor. The exterminating program in effect needs to be intensified.

Disaster preparedness 405.1136

Standard (b) Staff training and drills is not met.

A review of the fire drills showed evaluations by the staff for the past three months except for 1975. No drills were held January, February. The employees rated the drills from fair to poor; therefore, additional improvements in the training programs are needed.

Not Met	Findings	Recommendations
Medical Records 405.1132 (c) Content Standard not met	In 16 discharge records reviewed, discharge summaries were not completed and signed by the attending physician. In 4 of 13 current records reviewed, orders were not reviewed and updated every 30 days by the attending physician. Dental notes were not documented in medical records for the only three patients that were referred for dental treatment. Dietary notes were not documented in 27 of 29 records reviewed. Discharge summaries from referring hospitals were not available in 6 of 29 records reviewed.	The facility has appropriat policies and procedures regarding the deficiencies found. The administrator, medical director, and medical record consultant should collaborate in enforcing these policies and procedures. The medica record consultant should visit more frequently to assist in correcting these deficiencies.
(e) Completion of records and centralization of reports. Standard not met	See standard (c) Discharge summaries not completed and signed by the attending physician and not received from referring facilities.	See standard (c)

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Not Met	Findings	Recommendations
U. R. 405.1137 (h) Discharge planning Standard not met	The administrator has not delegated responsibility for discharge planning in writing. Written discharge planning procedures do not state how the discharge coordinator will function, and his authority and relationships with the facility's staff. The maximum time period after which a re-evaluation of each patient's plan is made indicates only that patients' plans will be re-evaluated as often as necessary. Discharge summaries are not complete with attending physician's signature. Documentation in medical records indicated that discharge planning is initiated on admission only.	Administrator, medical director and social worker consultant should collaborate in correcting deficiencies. State survey agency should provide special consultation and technical assistance for this deficient standard.

Other standards and elements found not met.

Element F43 under 405.1121 Standard (g) personnel policies and procedures. The survey reveals not all personnel records are current. Evaluations and training orientation was missing.

Standard (h) Staff development is not met.

Deficiencies are noted in elements F49, F50, F51, F52

Although documentation is available, there is no active orientation or ongoing training in the facility being given consistently nor does the program provide for inservice in:

Patient confidentiality
Preservation of patient dignity
Protection of patient's privacy

The documentation available is not specific nor does it reflect a consistent program for all personnel.

Elements F55 and F75 under Standard (i) Use of outside resources are not met.

The agreements must reflect objectives and financial arrangements as well as responsibilities. Although agreements are available, they did not confirm the active participation of the consultants in the facility. Consultant reports are not consistent nor do they reflect recommendations for the facility to implement. i.e., No consultant reports for social services. The last medical records' consultant report is dated 3/4/75.

Consultant reimbursements are not benefiting the patients in this facility particularly in the area of dietary and social services. The facility needs to correct this situation immediately so that individual needs of patients will be met.

Elements F65, F66, F67, F71 are not met under Standard (k) Patient Rights.

It appears that patients within the homes owned by the chain are transferred because of finances. F70. This allegation needs further exploration by the state agency.

Element F85 under Standard (l) Patient Care Policies.

The survey reveals that the medical records and minutes do not reflect that policies and procedures are written as implemented.

It should be noted that the facility has policies; however, the involvement of the medical director is questionable.

Standard (h) Standard kitchen and dietetic service areas not met.

See notations under dietary services standards 405-.1125 (e), (f) F242 and (g) F247.

Please note in reference to housekeeping and maintenance, the carpets throughout patient areas need cleaning. Urine odor is retained in the carpets.

ATTACHMENT 5

MEDICARE/MEDICAID

CERTIFICATION AND TRANSMITTAL

TO BE COMPLETED BY STATE SURVEY AGENCY

1. MEDICARE PROVIDER NUMBER (L1) 39-5337

2. MEDICAID ID NUMBER (L2) #0400357

3. NAME AND ADDRESS OF FACILITY
(L3) Town Court Nursing Center
(L4) 1526 Lombard Street
(L5) Philadelphia, Penna. (L6) 19146

4. TO: DHEW REGIONAL OFFICE
Reg. III
Philadelphia, Penna.

TO: TITLE XIX SINGLE STATE AGENCY
Dept. of Health
Commonwealth of Pennsylvania

5. CATEGORY OF PROVIDER / SUPPLIER (L7)
01 ☐ Gen. Hosp. 05 ☐ HHA 09 ☐ Chronic Dialysis Unit
02 ☐ Psych. Hosp. 06 ☐ Independent Lab. 10 ☐ ICF
03 ☐ TB Hosp. 07 ☐ Portable X-Ray 11 ☐ IMR
04 ☒ SNF 08 ☐ Outpatient PT/SP

6. TYPE OF ACTION (L8) X Special health survey-HEW request
1 ☐ Initial 4 ☐ Change of Ownership
2 ☐ Recertification 5 ☐ JCAH/AOA Validation
3 ☐ Reconsideration 6 ☐ JCAH/AOA Investigation

7. DATE OF APPLICATION (Initial certifications ONLY) (L9)

8. ACCREDITATION VERIFIED (Hospitals) (L10) 1 ☐ JCAH 2 ☐ AOA

CHANGE IN ACCREDITATION-BASED CERTIFICATION (Hospitals) (L11)
1 ☐ Gained Accreditation 2 ☐ Lost JCAH Accreditation
3 ☐ Lost AOA Accreditation

10. PURSUANT TO PROVISIONS OF SEC. 1864 AND APPLICABLE PROVISIONS OF TITLE XIX OF THE SOCIAL SECURITY ACT AND UPON CONSIDERATION OF ALL FACTS THE FACILITY IS CERTIFIED AS: (L12)
(a) ☐ In compliance with program requirements (If appropriate, check applicable boxes below)
(b) ☐ Not in compliance with program requirements (If Title XIX only, complete item 15)

Compliance is based on:
(1) ☐ Acceptable P.O.C.
(2) ☐ CFR sec. 405.1010 (Access provisions)
(3) ☐ P.L. 91-690 (24 Hour RN)
(4) ☐ 1861(j)(15)(7 day RN rural SNF)
and/or approved waiver(s) of the following requirements:
(5) ☐ Life Safety Code
(6) ☐ ANSI (Std. A 117.1)
(7) ☐ Organized Medical Staff
(8) ☐ Patient Room Size
(9) ☐ Beds Per Room

(c) ☐ Reapproval Deferred Until: (See Remarks)
(d) ☐ SNF/ICF Cancellation Date is: (1) ☐ Invoked (2) ☐ Rescinded

LICENSING, SCHEDULING & TRACKING UNIT
MAR 23 1977
DIVISION OF LONG TERM CARE
DEPT. OF HEALTH

11. SNF / ICF PERIOD OF CERTIFICATION (L13) (a) FROM (b) TO:
(c) CANCELLATION DATE (SNF/ICF) (L14)

12. SUPPLEMENTAL INFORMATION ON HOSPITALS AND SNF'S NOT IN COMPLIANCE (L15)
(a) Hospital meets emergency services hospital definitions (1) ☐ Yes (2) ☐ No
(b) Facility meets 1861 (e) (1) - Definition of hospital (1) ☐ Yes (2) ☐ No
(c) Facility meets 1861 (j) (1) - Definition of SNF (1) ☐ Yes (2) ☐ No (3) ☐ See attached SSA 1539 (a)

13. SUPPLEMENTAL ICF INFORMATION (L16)
(a) Completion date for ICF/LSC compliance
(b) 249.13 ICF Phase in Date

14. TOTAL OR DISTINCT PART CERTIFICATION	HOSPITALS	XVIII SNF	XVIII/XIX SNF	XIX SNF	XIX ICF	XIX IMR
BEDS CERTIFIED (L17)	(a)	(b)	(c) 198	(d)	(e)	(f)
BEDS PREVIOUSLY CERTIFIED (L18)	(g)	(h)	(i) 198	(j)	(k)	(l)

15. STATE SURVEY AGENCY REMARKS Report of Special Health Survey Attached.

Judith A. Passerin — 17. DATE (L19) 11 22 77
Judith A. Passerin
TITLE Registered Nurse

18. Joy B. Laff per J.A.P. — 19. DATE (L20) 4/8/77
TITLE Director, Division of Long Term Care

TO BE COMPLETED BY THE DHEW REGIONAL OFFICE OR SINGLE STATE AGENCY

20. DETERMINATION OF ELIGIBILITY (L21)
1 ☐ Facility is eligible to participate
2 ☐ Facility is not (or no longer) eligible to participate (If Title XIX only, complete item No. 26)

21. ☐ Facility is in compliance with Title VI of Civil Rights Act (L22)

22. ☐ Statement of financial solvency filed in accordance with regulation 405.603. (L23)

23. EFFECTIVE DATE OF (Enter All Applicable)
(a) PARTICIPATION (L24)
(b) AGREEMENT ENDING DATE (SNF) (L25)
(c) CANCELLATION DATE (SNF) (L26)
(d) SNF/ICF AGREEMENT EXTENDED, UNDER SEC. 1866(e)(1)(C) OF SOCIAL SECURITY ACT UNTIL: (MAXIMUM OF 60 DAYS) (L27)
(e) TERMINATION OR NON-RENEWING DATE (L28)
(f) EMERGENCY SERVICES (L29)

24. VOLUNTARY TERMINATION (L30) 1 ☐ CLOSURE 2 ☐ WITHDRAWAL 3 ☐ OTHER (Specify)

25. INTERMEDIARY NUMBER (L31)

26. REMARKS

27. PHS REVIEW (When applicable) 28. DATE (L32) 29. DETERMINATION APPROVED 30. DATE (L33)

Form SSA-1539 (11-70) OFFICE OF RESEARCH & STATISTICS

SOUTHEASTERN REGION
LONG TERM CARE

Telephone Number
Area Code (215) 631-
Ext. 2325

January 20, 1977

Norristown State Hospital
Building No. 37
Norristown, Pennsylvania 19401

Mr. Daniel Veloric
President, Geriatric Medical Centers
c/o of Town Court Nursing Center
1526 Lombard Street
Philadelphia, Pennsylvania 19146

Dear Mr. Veloric:

An unannounced visit was made to Town Court Nursing Center on November 22, 23, and 24, 1976, by David Hawk, M.D., Kay Dodds, R.N., Carole Schneider, R.N., and Nancy Burns, R.D., and me. The state survey team was joined by Ms. Claudette Campbell, R.N., HEW Long Term Care, on November 22, 1976.

The purpose of the visit was a follow-up survey based on the findings of a federal violation survey conducted July, 1976.

Patient care and physical environment observed on the days of the survey and in patient care areas was unacceptable. Significant deficiencies of a serious nature were identified in these areas as well as dietary, medical records, pharmacy, and infection control services.

These deficiencies were discussed in part with you and in total with John Halbrook, NHA, and members of the corporate administrative staff.

A follow-up visit to Towncourt on December 30, 1976, indicated that some inprovements in patient care areas and dietary have been made since the November, 1976 survey.

Enclosed is form SSA 2567 which outline the deficiencies. Please enter your plan of correction (including target dates) opposite each deficiency and remit to this office within ten (10) working days from receipt of this letter. You may detach and retain the provider copy for your files.

If you have any questions regarding this letter or the visits please do not hesitate to contact this office.

Very truly yours,
(Mrs.) Judith A. Passerin, R.N.
Field Representative

JAP/cef
Enclosures

January 3, 1977

Town Court Nursing Home
Jay E. Laff
Director, Division of Long Term Care

Judith A. Passerin, R.N.
Field Representative

Through: Dorothy H. Poppert, R.N.
Regional Supervisor

Enclosed please find the Summary of the visit to Town Court conducted November 22, 23, 24, 1976.

The full health survey report is currently being completed and will be forwarded as soon as possible.
JAP:ct

Town Court Nursing Home
1516 Lombard Street
Philadelphia, Pa. 19104

Kathleen Dodds, R.N.
Carole Schneider, R.N.
Judith Passerin, R.N.
Nancy Burns, R.D.
Field Representatives

SUMMARY

An unannounced visit was made to the above mentioned facility on November 22, 23, 24, 1976, by Mrs. K. Dodds, R.N., Miss Carole Schneider, R.N., Mrs. Nancy Burns, R.D., David Hawk, M.D., and Mrs. Judith Passerin, R.N. The surveyors were accompanied by Ms. Claudette Campbell, R.N., on the first day of the visit.

In July, 1976, a Federal survey team conducted a validation survey at this facility. Deficiencies were identified in medical and nursing services. The purpose of this visit was a full health survey to evaluate health care delivery and services to patients resultant to the report forwarded to this office by H.E.W.

The facility's administrator, Mr. John Holbrook, NHA, was apprised of the nature of the visit and the findings of the validation teams survey at the outset. A tour of the facility followed.

The patient care areas were toured by all members of the team. Serious patient care and environmental deficiencies were identified.

Patients were observed to be in need of assistance with activities of daily living. Many patients were improperly attired; dirty and torn clothing, barefooted, incontinent patients were soiled. Male and female patients were in need of showers, nail, mouth and hair care.

Patients both in and out of bed were observed in poor body alignment. Evidence of restorative nursing measures were not seen. Adaptive equipment is not utilized.

One patient with massive decubitus ulcers was ordered to be placed in isolation on the first day of the surveyor's visit. The following morning, the isolation technique and procedures were reviewed. This patient had been placed in a private room that was fully carpeted, even though tiled, private rooms were available.

The isolation gowns were of a disposable nature and sleeveless. When the survey team questioned the decision to utilize a carpeted room for isolation purposes, the patient was moved to another room.

Nursing assistants were later observed caring for this patient. They were not wearing gowns nor gloves. The soiled laundry was being carried out of the patient's room by a nurse's aide. This aide did not bag the laundry and was carrying it clutched to her body.

On all patient floors visited, patients were seated in lounge areas in numbers from 11 to 16. No nursing personnel were in attendance in these lounge areas.

Patients were observed restrained in chairs; the restraints were attached to the patients beds.

The physical environment in patient areas was poor. Soiled and clean linens were observed piled together on patients beds, bedside cabinets and chairs. Water

pitchers and cubicle curtains were observed soiled with feces. Toilet brushes were observed stored with water carafes and drinking cups. Roaches were observed in the second and third floor pantry. A urine odor was prevalent on the second and third floors. Shower and tub rooms as well as the floors of patient bedrooms were in need of cleaning. Soiled underpads were observed in patients bedside cabinets, on the floor and in bedside trash containers.

The dietary department was clean. Although a well qualified dietician has been employed by the facility, to-date she has not been able to function in her consultant capacity. Menus prepared by the dietician were rejected so that a menu utilized by another corporate facility could be instituted.

Medical records were reviewed by all survey team members. (See attached report by David Hawk, M.D.)

Many of the records reviewed lack patient care plans. Nursing care plans did not reflect the actual patient needs or goals. Verbal orders were not countersigned on a timely basis. Physicians' orders were not being executed promptly or correctly on eight records reviewed. Nurses' notes were not chronological or consistent especially as relates to patients who become ill or manifest unusual signs or symptoms. Medications were not being administered properly nor charted correctly (e.g. tincture of benzoin was being applied to a decubitus ulcer, tetrocycline was administered to a patient receiving milk).

The findings of the survey were discussed in detail with the President, Mr. Daniel Veloric, and several of his corporate and administrative staff members.

Suggestions for improvement in the various areas discussed were made.

The staff of this facility appeared receptive and concerned.

Addendum:

On December 20, 1976, members of the Town Court N.H. Staff were present in this office for consultation at their request. Those present were Daniel Veloric, President, John Holbrook, N.H.A., Bernadine Sterner, R.N., D.O.N., and Charles Fagin, F.S.S.

Mr. Holbrook introduced Mrs. Sterner, as the newly appointed director of nursing. The various changes in the operation of the facility and policy changes were reiterated.

A request was made, at this time, that a follow-up survey to the facility be made.

On December 30, 1976, an unannounced follow-up visit was made to Town Court by Mrs. Nancy Burns, R.D., and Mrs. Judith A. Passerin, R.N.

Patient care areas and the dietary department were toured. Overall improvements have been made. Nursing supervision has been increased. Assignments for nursing personnel are more concise and fit patient needs.

Housekeeping in-patient areas continues to be a problem. The handling of clean and soiled laundry although improved is still a problem.

Patient care observed has also improved but specific attention must still be directed to patients personal hygiene needs (torn clothing, ill-fitting clothing, socks, sweaters, nail care, shaving).

Many patient beds lacked blankets and patients complained of being cold.

Vast improvement has been noted in the dietary department. The menus have been totally revised to provide a nutritionally adequate diet with a nice variety of foods. Both the consultant dietician and the food service supervisor are aware of the individual dietary needs of the patients and are diligently striving towards a superior food service program. Dietary staff is still inadequate to sufficiently cover all functions of the department. Suggestions were made by the surveyors in regard to more frequent monitoring of night nourishments by nursing personnel (3-11 shift) to insure that patients routinely receive a bedtime feeding. The status of the food service supervisor is still undetermined pending receipt of documentation indicating he has completed an approved 90 hour course.

A post-visit conference was conducted with John Holbrook, NHA, Mrs. Cassidy, R.N., and Edward Zelcawitz, NHA. The improvements and findings were discussed. Mr. Holbrook has resigned his position and it is hoped that a replacement will be available as soon as possible to affect continuity. The corporate management team reportedly is spending considerable time and effort on-site in the facility so that compliance can be met.

ct

Visited 11/22, 23, 24, 1977

Town Court Nursing Center
1526 Lombard Street
Philadelphia, Penna. 19146

RECOMMENDATION:

Follow-up visits and/or consultation services to facility to insure continued improvements in patient

care and health services, as indicated in the plan of correction.

Attention should be directed to insuring that the facility exercises appropriate measures to attain compliance with all of the conditions of participation prior to expiration of the current provider agreement (as outlined by Robert Taylor at meeting in the OLTCSE January 5, 1977).

JAP:glm

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

Town Court Nursing Center, Inc., et al.

v.

Frank S. Beal, individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania, et al.

IX.

ORDER

AND NOW, this 15th day of September, 1977, upon consideration of plaintiffs' Motion for extending the duration of the preliminary injunction heretofore entered in this case, and after hearing thereon, it is ORDERED.

That plaintiffs' Motion is DENIED, and the preliminary injunction heretofore entered is DISSOLVED: provided, however, that the defendants shall not withhold payments for services actually provided to patients.

John R. Fullam,
J.

Filed September 15, 1977
9/16/77 Copy to USA
Entered: 9/16/77 Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

Town Court Nursing Center, Inc., et al.

v.

Frank S. Beal, individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania, et al.

X.

ORDER

AND NOW, this 15th day of September, 1977, plaintiffs having made oral application for a stay of this Court's Order, entered this date, substantially dissolving the preliminary injunction heretofore entered in this case, and the Court being of the view that the injunction should remain in effect for a sufficient period of time to permit the plaintiffs to appeal this Court's said Order, and to seek a further stay from the Court of Appeals, it is ORDERED that this Court's Order bearing even date herewith, dissolving the preliminary injunction heretofore entered in this case, is STAYED for a period of Ten (10) days from the date hereof, to permit the plaintiffs to file a Notice of Appeal and seek a further

stay from the Court of Appeals. To the extent that plaintiffs seek a longer stay from this Court, the request is DENIED.

(s) John P. Fullam
J.

9/16/77

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474
Class Action

Town Court Nursing Center, Inc.
and
Emma Cooper
and
Mary Crawford
and
Hazel Kemp
and
Arnold L. Phillips
and
Delphine Taddei
and
Nancy Truitt, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.,

Plaintiffs

v.

Frank S. Beal, individually and in his capacity, as Secretary of Public Welfare of the Commonwealth of Pennsylvania
and

Joseph A. Califano, individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare,

Defendants

XI.

NOTICE OF APPEAL

Notice is hereby given that Emma Cooper, Mary Crawford, Hazel Kemp, Arnold L. Phillips, Delphine Taddei and Nancy Truitt, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc., plaintiffs above named, hereby appeal to the United States Court of Appeals for the Third Circuit from the Order entered in this action on September 15, 1977.

(s) William F. Coyle
William F. Coyle
1430 Land Title Building
Philadelphia, PA 19110
Attorney for Emma Cooper, Mary Crawford, Hazel Kemp, Arnold L. Phillips, Delphine Taddei and Nancy Truitt

DATED: September 16, 1977

Filed Sep. 16, 1977
Entered 9/20
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

Town Court Nursing Center, Inc.
and
Emma Cooper
and
Mary Crawford
and
Hazel Kemp
and
Arnold L. Phillips
and
Delphine Taddei
and
Nancy Truitt, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.,

Plaintiffs

v.

Frank S. Beal, individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania,

and

Joseph A. Califano, individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare,

Defendants

XII.

NOTICE OF APPEAL

Notice is hereby given that Town Court Nursing Center, Inc., plaintiff above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order entered in this action on the 15th day of September, 1977.

(s) Jeffrey Albert
Jeffrey B. Albert
1401 Walnut Street
10th Floor
Philadelphia, PA 19102
Attorney for Town Court Nursing Center, Inc.

Of Counsel:
Fox, Rothschild, O'Brien & Frankel

Dated: September 16, 1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

XIII.

MOTION

[Caption Omitted]

Appellants, Town Court Nursing Center, Inc., by its attorneys, Nathan L. Posner and Jeffrey B. Albert, Esquires, and Emma Cooper, et al., by their attorney, William F. Coyle, Esquire, hereby move this Honorable Court to issue, pursuant to Rule 8 of the Federal Rules of Appellate Procedure, an injunction pending appeal in the above-captioned action and in support thereof set forth the following:

I. HISTORY OF THE CASE

1. On July 20, 1977, the above-captioned action was filed by Town Court Nursing Center, Inc. ("Town Court") and six patients (collectively referred to as "plaintiffs") seeking under the Fifth and Fourteenth Amendments to the United States Constitution and applicable federal regulations injunctive relief against, *inter alia*, the termination of Town Court's participation in the Medicare and Medicaid programs and the removal of patients from the skilled nursing home operated by Town Court until the administrative and judicial review of the termination is completed.

2. On July 22, 1977, at a conference attended by all counsel, the Honorable John P. Fullam, United States District Judge, issued a temporary restraining order maintaining the status quo until a hearing could be held.

3. A preliminary hearing was held on July 26 and 27, 1977. A true and correct copy of the transcript of that hearing has been separately filed. The District Court, per Judge Fullam, granted plaintiffs certain preliminary injunctive relief in the bench order and opinion, quoted below:

> The Court: I will note further that I have at counsel's request met with them in chambers and they in turn have met with each other, and it is my understanding that the Order which is about to be entered, while not consented to by any of the defendants, probably is not terribly inconsistent with their views as to an appropriate disposition.
>
> Specifically on the basis of the evidence which has been presented, it is my feeling that the harm which would be done to the patients as well as to the corporate plaintiff by the cessation of funding would be devastating and irreparable whereas there can be serious question as to the jurisdiction of this Court with respect to the merits of the controversy. I believe this Court does have jurisdiction for the limited purpose of maintaining the status quo during the period when the administrative action on the application for reconsideration is undergoing its routine processing and completion.
>
> Since it is clear on the record that the continuation of patients in that nursing home during

that period would not be inconsistent with the continued health and welfare of the patients—in other words, none of the alleged complaints bear on any serious safety or health hazards—under all those circumstances the following Order is entered:

That the Temporary Restraining Order heretofore entered shall remain in effect pending completion of administrative action on the pending application for reconsideration and until the defendants give to the plaintiffs at least five days' written notice of their intention again to terminate funding.

It is understood that during this period the funding will not be curtailed or cut off and that the defendants will not systematically or otherwise intentionally remove patients from the home except in cases where that is the patient's own voluntary choice or in cases of medical necessity. In short, there will be attempt to simply transfer patients for the sake of putting them in some other place rather than this.

And it is understood that there will be no prohibition during this interim period against placement of additional patients at the home.

I believe that covers it, does it not?

Mr. Posner: It is satisfactory to me, sir.

The Court: O.K. Good luck with the administrative review. I hope it proceeds expeditiously.

Thank you all.

4. Thereafter, on September 9, 1977 Town Court received from the United States Department of Health, Education and Welfare ("HEW") notice that on August 4, 1977, the reconsideration referred to in Judge Fullam's Order was denied. A true and correct copy of the reconsideration decision and the letter of transmittal are attached as Exhibit "A" hereto.

5. On September 12, 1977 plaintiffs filed a motion for extension and renewal of the preliminary injunction.

6. On September 15, 1977 a hearing was held on the aforesaid motion. A true and correct copy of the transcript of that hearing has been separately filed. At the conclusion of that hearing, Judge Fullam issued a bench order and opinion as follows:

Fullam, J.:

I may state that the primary purpose of the Court in this proceeding is apparently not capable of being realized.

Let me comment upon the evidence which has been presented both at the previous hearing and today. I am absolutely convinced that nobody in the administrative end of HEW who is involved in this case so far as a party here has the faintest idea of what they are doing.

I am persuaded that somebody got all upset with very good justification about complaints of conditions which existed back in 1975, at the latest, or early in 1976, and about financial irregularities. It is absolutely clear to me that

anybody in his right mind would conclude that the patients at Town Court Nursing Home are better off there than they would be anywhere else in the foreseeable future.

I am satisfied that the evidence which has been presented this morning by the first witness sounded more like a memorized recitation than testimony about facts. It was full of sweeping conclusions and gobbledygook, which makes no sense. The ultimate conclusion was simply the alleged reconsideration of this case was a conclusion that there was adequate documentation or sufficient documentation to substantiate the issue.

It is obvious to me that the taxpayers would have saved a lot of money if instead of all the time that has been wasted in review of documentation and appearance here in this proceeding and somebody has simply gone over and looked the place over. It is quite apparent to me that people are much more interested in sustaining previously stated positions, in dotting I's and crossing T's, than they are in actually carrying out sensibly the very beneficial program having to do with nursing homes.

Having said all that, I nevertheless reluctantly conclude that in view of the position taken by the Government, a position which I frankly do not understand and never will, there is nothing that the Court can do about it.

If the administrative bureaucrats persist in being blind to facts, if they persist in looking

at documents instead of institutions, if they persist in looking at regulations instead of facts and events, there is nothing the Court can do about it.

It is obvious to me that the outcome of the administrative review is a foregone conclusion. But it is equally obvious to me this is a matter in the control within the administrative agency and not within the control of the Court.

Therefore, it seems to me the long and short of it is that the bureaucrats will wind up with having to stew in their own juice.

I have attempted to make it possible for them to review this matter and arrive at a solution which will be beneficial to the patients involved. That has not borne fruit. It will be up to them to cope with the needs of these patients in some fashion, which I hope will bring them to a realization of the problem.

The Motion for Continuance of the Preliminary Injunction is denied except as follows:

The defendants are restrained from disapproving Medicare and Medicaid payments to those patients who are in the Home now and otherwise entitled thereto, so long as they remain patients in the home.

The effect of this will be that the plaintiff, Town Court Nursing Home, is not to be required to maintain patients without their being entitled to Medicare payments for those patients who are there.

If the powers that be in the bureaucracy wish to move the patients out, that is their privilege. They are going to pay for them while they are there, and it will be up to them to arrange alternative locations for them.

All of this is denied and the preliminary injunction, of course, is without prejudice to a reconsideration of the matter by the appropriate officials if there can be anyone prevailed upon to have enough enlightenment to look at the current situation and make a current judgment and not look at papers and make a bureaucratic judgment based upon what is on paper and what may have existed in the past.

7. Later that day, a written order was issued which denied plaintiffs' motion and dissolved the preliminary injunction "provided, however, that the defendants shall not withhold payments for services actually provided to patients." A true and correct copy of that Order is attached as Exhibit "B" hereto.

8. Following the hearing, plaintiffs made oral application for a stay of the Court's Order which application was granted for a period of ten (10) days "to permit the plaintiffs to file a Notice of Appeal and seek a further stay from the Court of Appeals. To the extent that plaintiffs seeks a longer stay from this Court, the request is DENIED." A true and correct copy of the Court's Order dated September 15, 1977 is attached as Exhibit "C" hereto.

9. On September 16, 1977 notices of appeal were filed by both Town Court and the patient-plaintiffs.

II. PARTIES

10. Town Court operates Town Court Nursing Center, a 198-bed skilled nursing care facility located at 1526 Lombard Street, Philadelphia, Pennsylvania.

11. Plaintiffs Emma Cooper, et al., are patients at Town Court who desire to remain at Town Court. Each plaintiff is a recipient of Medicaid benefits. The patient-plaintiffs have brought this suit on behalf of themselves and the other Medicaid recipients at Town Court.

12. The patients who occupy the beds at Town Court are primarily chronically ill elderly persons who average approximately seventy-five years of age. At present 193 of Town Court's 198 beds are occupied and 179 of the 193 patients at Town Court are participants in the Medicaid program.

13. Medicaid is a program of medical assistance to the indigent established by the laws of the Commonwealth of Pennsylvania, 62 P.S. §441 *et seq.*, and subject to federal regulations by reason of partial federal funding provided to state programs which comply with the federal regulations.

14. Defendant Frank S. Beal is sued individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania.

The Pennsylvania Department of Public Welfare is the state agency responsible for the certification of nursing homes as providers under the applicable state and federal law pertaining to the Pennsylvania Medicaid program. On May 20, 1977 Secretary Beal notified Town Court that effective July 18, 1977 all

funding to Town Court would be terminated and that Town Court's status as a provider was being terminated.

The notice further stated that the termination was the automatic result of the termination of Town Court's status as a Medicare provider by the United States Department of Health, Education and Welfare.

15. Defendant Joseph Califano, Jr. is sued individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare ("HEW").

HEW is responsible for the certification of nursing homes as providers under the applicable federal law pertaining to the Medicare program. Further, as referred to in the prior paragraph, federal regulations require that when a nursing home's Medicare certification is terminated by the federal authorities for the appropriate state agency, here the Pennsylvania Department of Public Welfare must in turn terminate the nursing home's certification under the Medicaid program.

On May 17, 1977 HEW gave Town Court a notice that its participation in the Medicare program was being terminated, in the same manner as set forth in the preceding paragraph, subject to reconsideration and hearing, if requested.

III. ADMINISTRATIVE REVIEW

16. Reconsideration of the HEW decision was requested by Town Court and, in connection therewith, Town Court forwarded to HEW a series of six reports on the conditions extant at Town Court.

17. As of the Court hearing on July 27, 1977 the reconsideration process had not yet begun.

18. However, by letter dated September 9, 1977, HEW stated that the reconsideration decision was made on August 4, 1977 and that reconsideration was denied.

19. Since September 9, Town Court has notified HEW of its intention to pursue all avenues of administrative review, including a hearing before an administrative law judge, which according to HEW's counsel, N.T. 108, will take from four to six months to complete.

IV. THE CASE LAW ESTABLISHES THE LIKELIHOOD OF PLAINTIFFS' SUCCESS ON THE MERITS

20. The overwhelming weight of judicial authority holds that nursing homes and their patients are entitled to injunctive relief against discontinuance of a home's status as a provider under Medicare or Medicaid until such time as administrative and judicial review of the administrative decision to terminate is exhausted. See, *e.g., Hathaway v. Mathews,* 546 F.2d 227 (7th Cir. 1976); *Klein v. Mathews,* 430 F. Supp. 1005 (D.N.J. 1977); *Ivy Nursing Home, Inc. v. Califano,* CCH Medicare and Medicaid Guide ¶28,470 (W.D. Pa. May 31, 1977).

21. Although the District Court has twice recognized that plaintiffs are entitled to injunctive relief, it erred in failing to maintain the status quo for the maintenance of the home until the administrative and judicial review processes are exhausted. *Maxwell v. Wyman,* 478 F.2d 1326 (2d Cir. 1973).

22. The District Court also erred in allowing into evidence a grand jury presentment which has not yet been the subject of any trial proceeding in which plaintiff Town Court has not had the opportunity to appear and defend itself and to cross-examine the witnesses against it. *See Great American Ins. Co. v. Pearson,* 220 Ala. 664, 127 So. 233.

V. PLAINTIFFS WILL SUFFER IRREPARABLE INJURY UNLESS AN INJUNCTION IS GRANTED

23. By lifting the injunction against the involuntary removal of patients from Town Court, the District Court failed to weigh the effect upon these patients of any such transfer. The adverse effect of transfer has been labelled "transfer trauma" which recognizes the substantially increased possibility of illness and even death among this group of elderly and infirm persons. *Burchette v. Dumpson,* 387 F. Supp. 812, 819 (E.D. N.Y. 1974). *Hathaway v. Mathews, supra,* and *Klein v. Mathews, supra,* quoting HEW Technical Assistance Memorandum A.A-TA-75-1 (Feb. 19, 1975):

> There is a genuine hazard in the relocation of infirm aging persons from one facility to another. Dramatic increases in mortality far in excess of what would normally be expected have been documented.

24. The continued operation of Town Court can be assured only when it has a sufficiently high level of occupancy to justify the economics of maintaining the large number of personnel and the substantial day-to-day expenditures necessary to maintain a high

quality of care and to comply with state and federal regulations.

25. Because of its location and the make-up of the available patient population, Town Court obtains few private patients. Thus, if no new Medicaid or Medicare patients can be referred to Town Court and the defendants are free to remove Medicare and Medicaid patients from Town Court, it will have a substantial number of empty beds.

26. Town Court presently receives $25.00 per Medicaid patient per day. As patient beds empty, this drop in income will compel Town Court to cease operating long before all Medicaid patients are removed.

27. The cessation of operations would irreparably damage Town Court's ability to hire and maintain personnel, obtain financing and satisfy the conditions for state licensure.

28. At all times prior to September 16, 1977, Town Court had at least ninety-seven percent (97%) occupancy and received a continuing flow of referral patients. No patient has left Town Court because of the conditions or quality of care therein.

VI. AN INJUNCTION WOULD NOT CAUSE SUBSTANTIAL HARM TO COME TO OTHER INTERESTED PARTIES

29. Both federal and state governments have a continuing financial responsibility to pay for skilled nursing care for persons in the Medicaid and Medicare programs, so long as such services are necessary.

Thus, wherever these patients are located, the federal and state expenditures will remain the same.

30. The federal and state interests in providing skilled nursing care of good quality and in safe surroundings here are satisfied at Town Court. The last state or federal inspection of Town Court occurred on June 22, 1977 when state inspectors recommended provisional licensure, a standard nearly identical to the standard of substantial compliance with Medicare and Medicaid regulations needed to maintain certification under these programs.

Further, there has been no allegation of any violation of the Federal Life Safety Code at Town Court. *Compare Hathaway v. Mathews, supra* at 231, *with Case v. Weinberger,* 523 F.2d 602 (2d Cir. 1975).

VII. AN INJUNCTION WOULD DO NO HARM TO THE PUBLIC INTEREST AND, IN FACT, WOULD FURTHER THE PUBLIC INTEREST

31. The Philadelphia community is confronted with a particularly acute shortage of skilled nursing home beds, particularly for Medicaid patients.

32. Town Court is one of the largest skilled care facilities in Philadelphia and there are no skilled care beds available in other facilities for Town Court's present patient population.

33. The public interest would be served by continuing the possible use of Town Court for so long as the law allows. In the absence of injunction, this public interest would be ignored.

VIII. CONCLUSION

For these reasons, supported in all respects by the findings of the District Court, an injunction should be issued to maintain the status quo during the pendency of these appeals.

(s) Nathan L. Posner
Nathan L. Posner
Jeffrey B. Albert
Attorneys for Town Court Nursing Center, Inc.

Of Counsel:
Fox, Rothschild, O'Brien & Frankel

(s) William F. Coyle
William F. Coyle
Attorney for Emma Cooper et al.

AFFIDAVIT

Commonwealth of Pennsylvania
County of Philadelphia ss

I, Donald Lewis, N.H.A., being duly sworn, do hereby state and aver that I am the licensed administrator of the nursing home operated by Town Court Nursing Center, Inc., that in my opinion the present condition of the home is excellent and presents absolutely no hazard to the life or safety of any patient therein, that I am authorized to take this affidavit on behalf of all appellants in this litigation, and that,

to the best of my information, knowledge and belief, all of the averments within the attached motion are true and correct.

(s) Donald Lewis
Donald Lewis

Sworn to and subscribed before me this 26th day of September, 1977.

Mary Frances Donohae
Notary Public
Philadelphia, Philadelphia Co.

My Commission Expires February 6, 1978

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Region III

3535 Market Street
Philadelphia, Pennsylvania

September 9, 1977

Re: *Town Court Nursing Center, Inc. v. Califano* C.A. No. 77-2474

Office of the
Regional Attorney
Mailing Address
PO Box 13716
Philadelphia,
Pennsylvania 19101

Judge John P. Fullam
Rm. 15614
United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Judge Fullam:

Enclosed is a copy of the notice of reconsideration determination to be issued by the Bureau of Health Standards and Quality of the Health Care Financing Administration, on September 14. Pursuant to your directive, we are notifying the plaintiffs five days in advance of the date of its issuance.

The reconsideration determination was reached on August 4, and received by the Bureau of Health Standards and Quality, Regional Office, on August 18. However, we thought it best to delay issuance of the notice until your return.

Sincerely yours,
Stephanie W. Naidoff
Regional Attorney

By:_____
Margaret M. Hathaway
Assistant Regional Attorney

cc: Jeffrey B. Albert, Esquire
William F. Coyle, Esquire
M. Faith Angell, Esquire
Jennifer Stiller, Esquire
Robert DeLuca, Esquire

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Region III

3535 Market Street
Philadelphia, Pennsylvania 19101

September 14, 1977

Health Care Financing
Administration
Mailing Address
PO Box XXX 8450
Philadelphia
Pennsylvania 19101

Refer to: HSQ-R3 (10) rez
Town Court Nursing Center
1526 Lombard Street
Philadelphia, Pennsylvania 19146

Attention: Donald B. Lewis,
Administrator

Dear Mr. Lewis:

This is in reply to your Request for Reconsideration of the decision of non-renewal of your Title XVIII (Medicare) provider agreement.

Your request, and supporting documentation, was forwarded to Health Care Financing Administration, Health Standards and Quality Bureau, Office of Standards and Certification, Baltimore, Maryland, for review.

The Office of Standards and Certification has determined that the decision of non-renewal was correct and that the documentation submitted contained no basis for reversing the decision of non-renewal.

Therefore, the decision of non-renewal is affirmed.

If you do not believe this decision to be correct, you may request a hearing before an administrative law judge of the Social Security Administration. A written request for a hearing must be filed no later than 60 days after the date of this letter. Such a request may be made to this office or as outlined in 20 CFR 405.1530 and 405.1531.

Sincerely yours,

(s) Gerald F. Szucs/Ph.D.
Gerald F. Szucs, Ph.D.
Acting Director, Health Standards and Quality Bureau

XIV.

ORDER

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 77-2221 and 77-2222 September 21, 1977

TOWN COURT NURSING CENTER, INC. AND COOPER, EMMA, CRAWFORD, MARY, KEMP, HAZEL, PHILLIPS, ARNOLD L., TADDEI, DELPHINE, TRUITT, NANCY, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.

vs.

BEAL, FRANK S., individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania, and CALIFANO, JOSEPH A., JR., individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare Town Court Nursing Center, Inc.,

Appellant, No. 77-2221

Emma Cooper, Mary Crawford, Hazel Kemp, Arnold L. Phillips, Delphine Taddei and Nancy Truitt, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.,

Appellants, No. 77-2222

(D. C. Civil No. 77-2474)

By: SEITZ, *Chief Judge,* and BIGGS and HUNTER, *Circuit Judges.*

Appellants' motion for injunction pending appeal, and to enjoin and restrain Defendants, Frank S. Beal and Joseph A. Califano, Jr., each of them, their agents, attorneys, deputies, employees and successors, from (a) systematically or otherwise intentionally removing patients who are eligible for Medicare or Medicaid benefits from Town Court Nursing Center, Inc.'s skilled care facility at 1526 Lombard Street, Philadelphia, Pennsylvania, except in cases where that is the patient's own voluntary choice or in cases of medical necessity; and (b) prohibiting placement of additional patients at the aforesaid facility, and Appellants to file security in the amount of $100.00, *and* for the Court's information, copies of D. C. transcript of September 15, 1977, and D. C. transcript of July 26 and 27, 1977 Preliminary Hearing, the above-entitled cases.

Respectfully,
(s) (Illegible)
Clerk

The foregoing Motion is granted pending further order of the court.

By the Court,
(s) (Illegible)
Judge

Dated: September 23, 1977

XV.

OPINION

UNITED STATES COURT OF APPEALS

For the Third Circuit

Nos. 77-2222 and 77-2444

TOWN COURT NURSING CENTER, INC.

AND

COOPER, EMMA, CRAWFORD, MARY, KEMP, HAZEL, PHILLIPS, ARNOLD L., TADDEI, DELPHINE, TRUITT, NANCY individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.

v.

BEAL, FRANK S., individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania,

AND

CALIFANO, JOSEPH A., JR., individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare

EMMA COOPER, MARY CRAWFORD, HAZEL KEMP, ARNOLD L. PHILLIPS, DELPHINE TADDEI and NANCY TRUITT, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc., Appellants in No. 77-2222

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health, Education and Welfare, Appellant in No. 77-2444

Appeal From the United States District Court for the Eastern District of Pennsylvania

(D.C. Civil No. 77-2474)

Argued January 4, 1978

Before: Seitz, *Chief Judge,* Gibbons and Garth, *Circuit Judges.*

Resubmitted In Banc July 10, 1978

Before: Seitz, *Chief Judge,* and Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis, Garth and Higgenbotham, *Circuit Judges.*

(Opinion filed September 29, 1978)

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Of Counsel:

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Department of Health, Education and Welfare
P. O. Box 13716
Philadelphia, Pa. 19106

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

Aldisert, *Circuit Judge*, with whom *Circuit Judges* Gibbons, Weis, and Higginbotham join.

Appellants in No. 77-2222, a proposed class action which was consolidated with *Town Court Nursing Center, Inc. v. Beal*, decided today, — F.2d—— (3d Cir. 1978), are six residents at the Town Court Nursing Center who contend that their due process and statutory rights would be violated by termination of Medicaid funding to the nursing home without a pre-termination hearing. Because the district court made no class-action determinations, we treat this as the appeal of the named patients only. They have appealed from an order of the district court denying their motion to extend portions of a preliminary injunction entered during an earlier phase of the litigation.

They had requested a preliminary and permanent injunction to prevent the defendants, "prior to a final determination of all appeals by Town Court Nursing Center, Inc.," from (a) terminating Town Court's Medicare and Medicaid certification; (b) removing eligible patients from Town Court; (c) discontinuing or withholding reimbursement for the care of Medicare and Medicaid patients; and (d) prohibiting future placement of other Medicaid-eligible patients at Town Court.

The district court issued a temporary restraining order on July 21, 1977, enjoining the defendants

from discontinuing or withholding reimbursement for care provided to eligible patients, pending reconsideration by HEW of a preliminary decision to terminate Town Court's provider status. Following a hearing, the district court granted the preliminary injunction sought by plaintiffs. The injunction by its terms was to remain in effect pending completion of the HEW reconsideration process, and until five days after the defendants gave plaintiffs written notice of their intention again to terminate Town Court's provider status. After HEW officials notified Town Court that they had affirmed the initial decision to terminate its Medicare provider status, Town Court and the six individually named appellants sought an order extending the preliminary injunction pending an evidentiary hearing and full judicial review. A hearing on this motion was held on September 15, 1977, after which the district court denied plaintiffs' motion to extend those parts of the preliminary injunction that enjoined removal of patients and that enjoined defendants from prohibiting the placement of new patients. We granted an injunction pending appeal that continued in effect those portions of the preliminary injunction that the district court had refused to extend.

Appellants first allege that they will suffer a de facto loss of Medicare benefits without the protection of a prior hearing if they are subjected to the physiological and pyschological harm caused by transfer from Town Court. Second, they believe they have a protected property interest in continued occupancy at Town Court so long as Town Court remains in compliance with the applicable statutes and regula-

tions. Consequently, they say that it was an infringement of these interests not to provide an evidentiary hearing and to allow for judicial review prior to decertification of the nursing center and prior to the de facto terminations of their "rights."

In another case decided today we held that

> [b]ecause a decision to decertify a nursing home as an unqualified provider is tantamount to an order to transfer a patient for his welfare, Medicaid residents threatened with transfer are entitled to some form of hearing on the existence of the condition or cause for transfer—whether the home is a qualified provider and whether decertification is for the patients' welfare.

Klein v. Califano, — F.2d —, — (3d Cir. 1978) (typescript opinion at 13). We believe the holding in *Klein* to be controlling as to the issues raised by these appellants. We therefore remand this cause to the district court for a determination of what procedures will satisfy the constitutional rights of appellants prior to decertification of Town Court Nursing Center and for further proceedings consistent with *Town Court, supra,* and *Klein, supra.*

In No. 77-2444, Secretary of the Department of Health, Education and Welfare Califano has cross-appealed from that portion of the district court order which required that he "not withhold payments [from Town Court Nursing Center] for services actually provided to patients." *Town Court Nursing Center, Inc. v. Beal*, No. 77-2474 (E.D. Pa., Sept. 15, 1977) (order extending preliminary injunction

in part and dissolving preliminary injunction in part). Because Medicaid certification and funding is so inextricably interrelated with federal administrative action through HEW, *see Town Court, supra,* — F.2d at — (opinion at 5-10) and in view of our holding that the residents of the nursing center have a right to a pre-termination hearing, that portion of the order from which Secretary Califano appeals will be affirmed.

The judgment of the district court in appeal No. 77-2222 will be vacated and the cause remanded for further proceedings consistent with *Town Court, supra, and Klein, supra.* Costs taxed against appellees.

The judgment of the district court in appeal No. 77-2444 will be affirmed.

Adams, *Circuit Judge,* with whom Gibbons, Weis and Garth, *Circuit Judges,* join, concurring.

In recent years, the government has become increasingly involved in satisfying the medical needs of its citizens, and the Medicare[1] and Medicaid[2] programs form an integral part of this development. They represent congressional enactments for the benefit of the aged and poverty-stricken sick, those on the fringe of society. This legislation has placed the recipient in a dependent position in relationship to government, and created a situation where the recipient expects to receive the privileges which Congress has voted to provide.

[1] 42 U.S.C. §1395 et seq. and implementing regulations.
[2] 42 U.S.C. §1396 et seq. and implementing regulations.

Due process, which secures legitimate property interests from arbitrary government intrusion, protects many of the expectations that flow from such dependent relationship by requiring that government accord affected individuals the process that is due them before it takes a contemplated course of action that may deny such individuals the benefits they anticipate. But the imposition of due process procedures as a predicate to government action can result in reduced efficiency of government operations and the availability of fewer funds for the intended beneficiaries. Concern has been expressed that unless the procedures made available to affected individuals are carefully fashioned their societal cost would outweigh their benefit.[3]

In this case, the full Court is called upon to determine whether patients whose nursing home is about to be decertified as a qualified institution under the Medicare and Medicaid programs have any due process rights, and if so, the extent of such rights. The factual and procedural background of the controversy as well as the relevant statutory and regulatory provisions are set forth in the various opinions in the companion cases, *Town Court Nursing Center, Inc. v. Beal,* No. 77-2221 (3d Cir., Sept. 29, 1978), and *Klein v. Califano,* No. 77-1896 (3d Cir., Sept. 29, 1978). The appeal in this specific proceeding has been brought by six residents of Town Court

[3] *E.g.,* Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267, 1276 (1975).

Nursing Center who contend that their due process and statutory rights would be violated if they are not given an opportunity for a hearing before Medicaid funding to the nursing home is terminated. In opposition, HEW and the Pennsylvania Department of Public Welfare maintain that since termination of a facility's eligibility for Medicaid funding does not affect the patient's entitlement to reimbursement for medical care, the patients have not been deprived of any constitutionally protected property right by the decision to terminate.

The opinion announcing the judgment of the Court relies on the decision filed today in *Klein v. Ca[illegible]no*, No. 77-1869 (3d Cir., Sept. 29, 1978), to conclude that the Medicare and Medicaid laws and regulations grant patients a protectible property right to continued residency at the home of their choice absent specific cause for transfer, and that consequently due process requires that they be given an opportunity for a hearing before decertification of their facility. I concur in that determination, but believe it appropriate to set forth some additional thoughts so as to clarify further this position in view of Chief Judge Seitz's dissent.

Moreover, there has been no discussion of the procedures to which the patients are entitled under due process. In *Klein*, the procedural posture in which the issue was presented rendered moot any discussion of precisely what process was constitutionally mandated. Accordingly, the Court in that appeal stated, "We pretermit the issue of how extensive is the process due patients, such as the plaintiffs here, until a case presents us with a continuing live dispute." *Id.* at 18. It seems to me that *Town Court* is such a controversy. Nonetheless, the opinion announcing the judgment of the Court chooses not to discuss the issue, but rather to "remand this cause to the district court for a determination of what procedures will satisfy the constitutional rights of appellants prior to decertification of Town Court Nursing Center and for further proceedings consistent with *Town Court, supra,* and *Klein, supra.*" Aldisert opinion at 5. Since I believe that in a situation such as this, an appellate court has the obligation to furnish guidance to the district court that may be utilized on remand,[4] this opinion shall also address the problem of what process is due the patients.

I.

An overriding consideration that a court must take into account when it confronts a procedural due process issue is the balance that is to be struck between fairness to the individual and effective government. On the one hand, the concept of due process embodies the law's fundamental respect for the dignity of the individual and its concern to shield him from the arbitrary whims of a government that overwhelms him both in size and power. On the other hand, government could be paralyzed if it were required to afford individuals who will be adversely

[4] *See* Geraghty v. United States Parole Commission, Nos. 77-1679 and 77-1858, slip op. at 25 (3d Cir., filed March 9, 1978). Without such guidance there exists the possibility that this Court's energies will be taxed unnecessarily by yet another appeal, and that the trial court may be required to duplicate its effort as well.

affected by its decisions lengthy procedural safeguards before it may implement such decisions. The Supreme Court has prudently instructed that these competing values be resolved by a two-step analysis.[5] First, it must be ascertained whether the private party has a constitutionally cognizable life, liberty or property right which is threatened by the government action. An open-minded approach towards recognizing such rights enables the law to afford individuals the protection that due process envisions in the multifarious situations in which they are affected by government decisions. Second, the precise protective procedure to which the private party is entitled before he is deprived of his right must be determined. Only at this second step should practical countervailing interests be taken into account to formulate procedures that are responsive to the interests of both the government and the private party. Such methodology, I believe, should control the treatment of the present case.

A.

A survey of the history of due process reveals a steady expansion in protected rights.[6] In large mea-

[5] *See* Memphis Light, Gas and Water Division v. Craft, 46 U.S.L.W., 4398, 4400, 4401 (U.S. May 1, 1978); Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part); *id.* at 177, 186 (White, J., concurring in part and dissenting in part); *id.* at 207, 212 (Marshall, J., dissenting). For a historical sketch of the development of the two-step analysis, *see* L. Tribe, American Constitutional Law §10-8 at 507-08; §10-10 at 532-33 (1978).

[6] *See e.g.*, Memphis Light, Gas and Water Division v. Craft, 46 U.S.L.W. 4398 (U.S., May 1, 1978) (public utility service); Mathews v. Eldridge, 424 U.S. 319 (1976) (disability benefits under Social Security Act); Gross v. Lopez, 419 U.S. 565 (1975) (public high school education); Wolff v. McDonnell, 418 US. 539 (1974) ("good time" credits towards a shortened jail sentence, and solitary confinement); Perry v. Sinderman, 408 U.S. 593 (1972) (teacher's employment tenure at state university); Morrissey v. Brewer, 408 U.S. 471 (1972) (conditional freedom following parole); Bell v. Burson, 402 U.S. 535 (1971) (driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (state welfare benefits). ***But see*** cases cited in note 8 *infra*.

sure the source of this trend lies in the recognition that the distinction between those rights which a private party can claim against the government and those benefits to which he merely has a government granted privilege is untenable in a society where individuals are becoming ever more dependent on government "privileges" for their very subsistence.[7] The

[7] *See e.g.* Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Sherbert v. Verner, 374 U.S. 398, 404 (1963). For discussions of the erosion of the right-privilege distinction, see R. O'Neil, The Price of Dependency: Civil Liberties in the Welfare State (1970); Linde, *Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector*, 39 Wash. L. Rev. 4 (1964); Powell, *The Right to Work for the State*, 16 Colum. L. Rev. 99 (1916); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1445-49 (1968); Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 Duke L.J. 89; Note, *The Effect of Tenure on Public School Teacher's Substantive Constitutional and Procedural Due Process Rights*, 38 Mo. L. Rev. 279, 281-87 (1973); Comment, *Due Process and Public Employment in Perspective: Arbitrary Dismissals of Non-Civil Service Employees*, 19 U.C.L.A. L. Rev. 1052 (1972).

fundamental concept undergirding due process—that an individual not be stripped of his dignity by being subject to the arbitrary whims of government—applies with equal force to privileges as to rights. Thus, it is now accepted doctrine that whenever an individual has a "legitimate claim of entitlement" that stems from state or federal law, regulation or practice, he may not be deprived of it without due process.[8]

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[8] Board of Regents v. Roth, 408 U.S. 564, 577 (1972). In *Roth* the Supreme Court held that a teacher hired by a state university for a fixed term of one academic year did not possess a constitutionally protected interest in re-employment for the next year. Other cases that have dismissed claims of entitlement on the ground that in fact they merely expressed unilateral expectations that were not recognized by state or federal law include Meachum v. Fano, 427 U.S. 215 (1976) (transfer of prisoner to another state prison); Paul v. Davis, 424 U.S. 693 (1976) (police flyer identifying individual as a "known" shoplifter); Bishop v. Wood, 426 U.S. 341 (1976) (police officer employment). The insistence in these cases that the "legitimate claim of entitlement" be identified only by reference to positive law has been criticized by commentators as manifesting too narrow and rigid a conception of the rights guaranteed by the Constitution and as being internally inconsistent. See L. Tribe, American Constitutional Law §§10-10 & 10-11 (1978); Monaghan, *Of "Liberty" and "Property"*, 62 Cornell L. Rev. 405 (1977); Van Alstyne, *Cracks in the "New Property": Adjudicative Due Process, in the Administrative State, id.* at 445; Tushnet, *The NewerProperty: Suggesting for The Revival of Substantive Due Process, 1975 Supreme Court Review 261;* Comment, *Entitlement, Enjoyment and Due Process of Law,* 1974 Duke L.I. 89; Comment *Two Views of a Prisoner's Right to Due Process: Meachum v. Fano,* Harv. Civ. Rights Civ. Lib. L. Rev. 405 (1977); *The Supreme Court, 1975 Term,* 90 Harv. L. Rev. 56, 86-104 (1976). However, in determining whether there is a protected property interest in the situation before us, we are bound by the guidelines enunciated by the Supreme Court.

The majority in *Klein* relies on three aspects of the Medicaid scheme[9] to establish as an initial proposition that a resident of a nursing home has "a legitimate entitlement to continued residency at the home of [his or her] choice absent specific cause for transfer."[10] First, reference is made to those provisions that guarantee that a person eligible for medical assistance under Medicaid may obtain medical services from any institution qualified under the federal program to perform such services.[11] Next, the opinion cites the regulations that ensure notice and a hearing to a recipient "who is aggrieved by an agency action resulting in suspension, reduction, discontinuance or termination of assistance."[12] Finally, the majority invokes the provision which states that a resident may be "trans-

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[9] In *Klein,* only termination of Medicaid reimbursements to the nursing home was at issue. In *Town Court,* on the other hand, HEW decertified the facility for Medicaid as well as for Medicare purposes. Nevertheless, *Klein's* treatment of the Medicaid provisions is equally apposite to the Medicare aspect of the *Town Court* litigation since at least two of the provisions of the Medicaid program that were relied upon in *Klein* have their counterparts in the Medicare statute and regulations. *See notes* 11-13 *infra.*

[10] Opinion at 12.

[11] 42 U.S.C. §1396a(a)(23); 45 C.F.R. §249.20 (1976). The parallel provision in the Medicare scheme is 42 U.S.C. §1395a.

[12] 45 C.F.R. §205.10(a)(5); *id.* §(4)(i). The Medicare scheme guarantees similar procedural protections. 20 C.F.R. §404. 901 et seq. (1976); *see id.* at §405.701.

ferred or discharged only for medical reasons or for his welfare or that of other patients, or for nonpayment for his stay."[13] After inferring a property right from these clauses, the Court in *Klein* posits that "a decision to decertify a nursing home as an unqualified provider is tantamount to an order to transfer a patient for his welfare,"[14] and consequently concludes that "Medicaid residents threatened with transfer are entitled to some form of hearing on the existence of the condition or cause for transfer—whether the home is a qualified provider and whether decertification is for the patients' welfare."[15]

In his dissent in this case, Chief Judge Seitz takes issue with the *Klein* majority regarding its premises and its conclusion. He finds unpersuasive any inference from the Medicaid plan of a property right that nursing home residents may assert in opposition to decertification of such facility. He notes that the first provision cited by the majority guarantees only that a recipient have the right to choose among *qualified* institutions; that the second provision ensures notice and a hearing only before termination or reduction in benefits, not before transfer from an unqualified facility; and that the third provision imposes upon the medical facility a standard of conduct with regard to transfer and discharge of individual residents and does not create any rights in the residents vis-a-vis HEW.[16]

[13] 45 C.F.R. §249.12(a)(1)(ii)(B)(4) (1976).

[14] Opinion at 13.

[15] *Id.* (footnote omitted).

[16] Opinion at 29.

This attempt by the dissent carefully to delimit the scope of the property right created by the three provisions, I believe, misses the thrust of the regulations and tends to trivialize the majority's approach in inferring a basis for the right to due process. Surely the majority does not intend to ground the property rights of the residents of Town Court on the regulation that requires notice and a hearing for the recipient prior to termination or discontinuance of Medicaid benefits. Similarly, the majority undoubtedly acknowledges that the provision that places limitations upon transfer or discharge is addressed only to the facility, not to HEW. However, when conjoined with the grant of freedom to choose among any qualified institutions, these regulations paint three distinct points in the landscape of a "legitimate claim of entitlement" that Medicaid beneficiaries can assert. Taken alone, the interest created by each of these clauses might be dismissed as not rising to the level of a cognizable property interest. However, when viewed together, they compel the conclusion that they identify three aspects of an "underlying substantive interest"[17] that enjoys the stature of "property."

What are the identifiable contours of this property right? First, it is evident that every Medicaid recipient has a protected right to uninterrupted receipt of benefits under the program. He or she may not be deprived of these payments without prior notice and an evidentiary hearing. Second, the regulations al-

[17] Memphis Light, Gas and Water Division v. Craft, 46 U.S.L.W. 4398, 4400 (U.S., May 1, 1978).

low an elderly, infirm individual who seeks nursing home treatment freedom of choice in selecting the home of his or her preference so long as that home has qualified under the Medicaid program. Once confined in the home, the resident has a right to remain there and may be moved only under specific circumstances. The facility itself may transfer or discharge a resident "only for medical reasons or for his welfare or that of other patients, or for nonpayment for his stay."[18] The regulations do not explicitly specify any circumstances under which HEW may cause the removal of a resident from his chosen facility. However, at least two such situations are inherent in the regulatory scheme. HEW may instigate a resident's removal by terminating his benefits. Also, HEW may precipitate a resident's transfer to another home by decertifying the facility at which he presently resides, inasmuch as the regulation ensures only the freedom to choose among qualified institutions. This last aspect of the property right is implicated in *Klein* and *Town Court.*

The Supreme Court has repeatedly stated that "some kind of hearing is required at some time before a person is finally deprived of his property interest." *Memphis Light, Gas & Water Division v. Craft,* 46 U.S.L.W. 4398, 4402 (U.S. May 1, 1978), *quoting Wolff v. McDonnell,* 418 U.S. 539, 557-58 (1974). *See also Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). Inasmuch as the regulatory scheme invests each resident with a right to remain at the facility of his choosing so long as it qualifies under the plan,

[18] 45 C.F.R. §249.12(a)(1)(ii)(B)(4) (1976).

the decision to decertify the institution necessarily effects a deprivation of this right and entitles the resident to due process procedures.[19]

I agree with the dissent—as must my other colleagues—that nursing home residents have no right to choose or to remain in a non-qualified facility. But that begs the question, at least in the instant case. For this limitation on the residents' property right perforce has no bearing on the issue whether residents of a *presently qualified* facility—as were the Town Court residents at the time in question—must be given the opportunity to participate in deliberations that may lead to the facility's decertification. The continued existence of the residents' constitutionally protected property right to remain in the home of their choice hinges on whether the facility is qualified. And the residents here are seeking to present information touching on that issue. Consequently, due process mandates that before they are deprived of their right, the affected individuals be afforded the opportunity to be heard on the material factual issue of the home's qualification.[20]

[19] This conclusion is buttressed by the fact that the regulations already provide the patients with procedural safeguards in the two other situations where their removal from the facility of their choice is authorized, namely, when the facility seeks to transfer them, *see* note 13 and accompanying text *supra,* and when HEW terminates their benefits, *see* note 12 and accompanying text *supra.*

[20] This analysis rests solely on the limited property right established by the first provision cited by the *Klein* majority, 42 U.S.C. §1396a(a)(23); 45 C.F.R. §249.20 (1976). The other two provisions referred to in *Klein* merely shed light on Congress's intent to create a property interest in favor of

In addition to disputing the existence of a property right, the dissent makes a number of arguments to support its contention that there is nothing "harsh or unrealistic about the scope of present statutory and administrative procedures governing decertification."[21] First, the dissent attempts to distinguish the Town Court situation from the circumstances presented in the Supreme Court cases employed by the

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nursing home residents to remain in the qualified home of their choice.

Accordingly, the interpretation proffered herein does not necessitate making the assertion—made by the *Klein* majority—that decertification of a facility is tantamount to a decision to transfer an individual resident. Nevertheless, the analysis here suggests the fallacy in the dissent's refutation of the majority's assertion. The dissent concedes that the practical effect of decertification in most cases is the forced transfer of residents, but maintains that an analytical distinction exists because decertification focuses on the facility's substantial noncompliance with HEW standards. Since residents have no right to remain in an unqualified institution, the dissent reasons, " 'transfer trauma' . . . is subordinate to the threat posed to all residents by substandard conditions." Opinion at 30. As pointed out in the text, however, the dissent assumes as a premise the factual issue which the residents seek to contest, namely, whether the institution is unqualified within the meaning of the statute.

Obviously, inasmuch as the holding that residents of a nursing home who receive benefits under the Medicare or Medicaid programs are entitled to due process procedures before the home is descertified rests on this Court's construction of the governing regulations, the decision is limited to such patients. The rights of other patients—such as those hospitalized for mental illness or retardation in state institutions—is dependent upon the language and intent of the provisions controlling their confinement.

[21] Opinion at 30.

majority[22] on the ground that decertification of an institution does not terminate or otherwise prejudice the rights of the residents to receive Medicaid benefits so long as they live in another, qualified facility. This distinction appears to be beside the point. Just as the right to Medicaid benefits is cognizable under due process, so too is the right to remain at the qualified facility of one's choice, and *this* right *has* been prejudiced by decertification of the facility.

Second, the dissent points out that since the institution has a vested interest in preserving its status under the Medicaid plan, it can be expected to adduce the best case for continued certification. And, the dissent continues, the institution is in the position to correct deficiencies and thus avoid termination. While these observations appear to be correct, they cannot obviate the need under due process to afford residents the opportunity to present *their* perceptions and perspectives on the issue of decertification. It seems to me to be a proposition fraught with danger —and indeed incorrect as a matter of due process analysis—to curtail the legitimate property rights of the residents simply because the residents are funded indirectly through payments to the nursing home, thus creating a property right in the institution as well. Rather, due process protections must be accorded equally to the "legitimate claims of entitlement" of the residents and to the institution.

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[22] Memphis Light, Gas and Water Division v. Craft, 46 U.S.L.W. 4398 (U.S., May 1, 1978); Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1974).

Third, the dissent suggests that the administrative procedures currently in existence adequately protect the interests of the residents. Chief Judge Seitz specifically takes judicial notice of a Pennsylvania Department of Health manual[23] which states that the required on-site predecertification survey "generally involves" interviews with residents,[24] and notes that the survey team consists of highly trained professionals. He also remarks that senile and incompetent residents would often be unable to participate in a due process hearing. Finally, the dissent raises the specter of administrative and judicial delays if residents are afforded participation rights "in all surveys and, presumably, in judicial review of their sufficiency."[25] Since these contentions appear logically to be directed to the *type* of due process procedure to which the residents are entitled, they are best treated in that context.

In sum, the Medicare and Medicaid programs appear to establish a "legitimate claim of entitlement" which must be accorded due process protection. However, even if a court were to conclude that the governing provisions do not on their face create such a property right, it would be required to construe them in a manner that fairly accords with the circumstances of the parties and with the underlying purpose of the due process clause. I believe that the result reached by a majority of this Court comports with that mandate. It would be difficult to contend that nursing

[23] Pennsylvania Department of Health, Long Term Care Facilities Surveyor's Orientation Manual (September 1976).

[24] *Id.* at III 8-9.

[25] Opinion at 32.

home patients do not have a strong interest in avoiding unnecessary transfers. Many of them have been uprooted from the communities in which they spent their working lives. For most of these patients, the limited world of the nursing home is the only community in which they retain a stable network of personal and social relationships. In addition, invalids and prospective invalids alike have a strong interest in avoiding the unnecessary physical hardship that could result from a mistaken transfer. These "home" and "health" interests, I submit, are among those that most persons would regard as being encompassed by the protections of the due process clause.

Also, we may take judicial notice of the fact that the plaintiff patients in these cases are physically weakened, economically disadvantaged, and often without significant contact with or control over the "outside community." Economic need and physical incapacity appear to have forced them to seek support from the government. They thus are members of a class of persons to whom the enforcement of essential procedural protections through a non-majoritarian branch of the government is of special importance.[26] For us to construe the controlling provisions strictly against the patients in such circumstances would seem to violate elementary notions of fairness.

These practical factors, to my mind, are relevant and persuasive on the issue of whether the statute and regulations should be interpreted to create a protected property interest in this case. The majority's reading

[26] See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

of the statute fairly conforms to these underlying equitable concerns. Even if the dissent's strict construction were textually plausible, it is inconsistent with this more elemental understanding of the problem.

The kind of issue raised in this case is one that this Court will doubtless face again. Federal transfer payments, which are an enormous factor in total economic activity, have resulted in all sorts of new quasi-contractual relationships. They have thereby transformed, for millions of persons, the very nature of property. An occupant of a nursing home, for example, will in many cases have no property interest in this world other than the expectation of occupying a familiar room and seeing familiar faces. Because that expectation does not fit into a conventional legal pigeonhole like a leasehold for a term or a tenure of employment, many judges may be uncomfortable with the thought of affording it appropriate due process protection. But there is, it seems to me, more rather than less need for the recognition of minimum due process protections for the new forms of property which arise out of the increasing role of government in transfers of the fruits of the economy. We should be alert for and receptive to claims for due process protection of those new forms of property, and where the terms of the authorizing rules permit, we should be prepared to take a practical rather than a technical approach to such claims, whenever it is necessary to protect the dignity and autonomy of those who participate in wealth transfer programs.

B.

Once it is determined that the government is constrained from taking a particular action affecting private parties without according them due process of law, it is essential to ascertain what process is due. The principle that governs this second phase of the due process inquiry is to be contrasted with the inclusive approach towards identifying the rights that are entitled to due process protection. As the Supreme Court has instructed, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands". *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), *quoting Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).[27] Thus, practical considerations play a prominent role in fashioning the procedural safeguards that will implement the fundamental due process concern of preventing officials from arbitrarily interfering with private endeavors. The practical considerations reflect the recognition that the government must be able to function efficiently and expeditiously and that if scarce public resources are to be used optimally, the government cannot be unduly fettered in administering its programs by costly and time consuming bureaucratic procedures.[28] Therefore, in assessing what procedural safeguards are necessary before government may deprive a private party of a constitutionally protected interest, courts should be careful to require

[27] *See also* Cafeteria and Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961); Joint Anti-Fascist Refugees Comm. v. McGrath, 341 U.S. 123, 162-63 (Frankfurter, J., concurring).

[28] *See* Mathews v. Eldridge, 424 U.S. 319, 347-48 (1976).

only the minimal protections mandated by due process, leaving the other branches of government free to determine the extent of the procedural protective mechanisms that will be authorized.[29] The constitutionality of a chosen scheme should be upheld if it permits the aggrieved party to air his views in such a manner that the risk of an erroneous determination by the government is reduced and the value of other, more burdensome procedures is outweighed by the cost and delay that they would entail.

This flexible framework for analyzing what procedural safeguards are mandated by due process has been clearly articulated in *Mathews v. Eldridge,* 424 U.S. 319, 334-35 (1976).

> [R]esolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett v. Kennedy, supra,* at 167-168 (Powell, J., concurring in part); *Goldberg v. Kelly,* at 263-266; *Cafeteria Workers v. McElroy,* at 895. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved

[29] *See* Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

> and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e.g., Goldberg v. Kelly, supra,* at 263-271.

When balancing the governmental and private interests to arrive at the process that is due, only once has the Supreme Court insisted on a full evidentiary hearing before the government decision in question became effective.[30] The Court in *Goldberg v. Kelly,* 397 U.S. 254 (1970), held unconstitutional a procedure which provided for written submissions by the welfare recipient but no hearing before payments were cut off. In requiring that the welfare recipient be afforded a pre-termination full evidentiary hearing at which he can appear personally, offer oral evidence and confront witnesses, *Goldberg* recognized that

> "the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. This need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy."

Id. at 264. (emphasis in original). The Court concluded that "the interest of the eligible recipient in uninterrupted receipt of public assistance coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the state's

[30] *See* Mathews v. Eldridge, 424 U.S. 319, 340 (1976).

competing concern to prevent any increase in its fiscal and administrative burdens." *Id.* at 266.

In other cases before the Supreme Court, due process has been found to be satisfied by administrative procedures that did not include a full evidentiary hearing before the deprivation. Thus, where a private party sought to garnish property, the Court held that due process requirements were met if the garnishing party was required to initiate an *ex parte* proceeding before a neutral officer, supply an affidavit supporting the claim to the property, and post a bond, provided that the aggrieved party is given an opportunity to contest the seizure promptly thereafter. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972). Also, in *Arnett v. Kennedy*, 416 U.S. 134 (1974), the Court upheld the administrative procedures for dismissing a federal employee for cause, which included a copy of the charge and an opportunity to file a written response and to make an oral appearance before the dismissal, with an evidentiary proceeding only thereafter. Just last term the Supreme Court found that an informal administrative remedy whereby a customer whose municipal utility service was to be cut off for nonpayment of bills would be permitted to meet with "a responsible employee empowered to resolve the dispute" was sufficient to satisfy the dictates of due process. *Memphis Light, Gas and Water Division v. Craft*, 46 U.S.L.W. 4398, 4403 (U.S., May 1, 1978).

Of the recent Supreme Court pronouncements regarding the process that is due in various situations,

Mathews v. Eldridge[31] is most instructive for determining what protections must be accorded the patients in the instant case. In *Eldridge* the Supreme Court was faced with whether due process required that a recipient of Social Security disability payments be afforded an opportunity for an evidentiary hearing before his benefits were terminated. After carefully balancing the private[32] and public[33] interests as they were manifested in the situation before it and evaluating the fairness and reliability of the existing pretermination procedures,[34] the Court found that the

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[31] 424 U.S. 319 (1976).

[32] The Court determined that since the recipient is entitled to retroactive benefits if he ultimately prevails, his only interest is in the uninterrupted receipt of funds pending final disposition of his claim. 424 U.S. at 340.

[33] The Court mentioned "the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision," and noted the strong interest of the public "in conserving scarce fiscal and administrative resources", particularly since "the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving . . ." 424 U.S. at 347-48.

[34] The Court focused on the fact that in most cases the validity of the disability claim hinges on the evaluation of easily documented routine and unbiased medical reports, and concluded that since credibility is rarely an issue the reports could be assessed upon written submissions, as provided in the existing procedures. This was found to create a decided distinction between *Eldridge* and *Goldberg v. Kelly, supra*, in that oral presentation was deemed to be essential for a welfare recipient to communicate his case to the decision-maker in view of the low educational level of most recipients. 424 U.S. at 343-45.

elaborate administrative mechanism provided by the Social Security Administration[35] satisfied the mandate of due process, and that a full evidentiary hearing was not required. Noteworthy is the admonition with which the Court concluded its opinion:

> [T]he judicial model of an evidentiary hearing is neither a required, nor even the most effective method of decisionmaking in all circumstances. . . . All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," *Goldberg v. Kelly*, 397 U.S. at 268-269 (footnote omitted), to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals. See *Arnett v. Kenney*, 416 U.S., at 202 (White, J., concurring in part and dissenting in part).

424 U.S. at 348-49.

[35] Among other procedural safeguards, the administrative mechanism required the state agency which administered the program to evaluate periodically the recipient's continued eligibility. Its assessments were to be based on investigations performed by its own medical and nonmedical personnel as well as upon information which it solicited from those who treated the recipient and from a detailed questionnaire from the recipient himself. Upon reaching a tentative conclusion that benefits should be terminated, the agency was required to provide the recipient with a summary of the evidence upon which it based its assessments, to afford him an opportunity to review his file, and to permit him to respond in writing and submit additional evidence. After the state agency made its final determination, it was to be reviewed by an examiner in the Social Security Administration Bureau of Disability Insurance and accepted by the Administration. Benefits were to be terminated two months after the month in which medical recovery is found to have occurred. The recipient is given the right to have the termination reviewed by different levels in the state agency, the Administration, and finally, the federal courts. If he prevails to any degree the recipient is entitled to retroactive payments. 424 U.S. at 336-39.

It is evident, in view of *Eldridge*, that the Town Court residents need not be afforded an evidentiary hearing before the decision to decertify the facility becomes final. *Eldridge* emphasized that the critical element that underlay *Goldberg's* requirement of a pre-termination evidentiary hearing was that without welfare benefits the recipient was left destitute, and would in all likelihood be unable to pursue his administrative remedies. This factor was found lacking in *Eldridge*[36] and is also absent from the situation in Town Court, where the patients will continue to receive Medicaid assistance after their transfer to other facilities. Consequently, no justification would seem to exist here for departing from the general rule that due process is satisfied by "something less than an evidentiary hearing,"[37] as long as the selected procedures "assure fair consideration of the entitlement claims of individuals."[38]

[36] 424 U.S. at 340-43.

[37] Mathews v. Eldridge, 424 U.S. 319, 343 (1976).

[38] *Id.* at 349.

In determining what process is due the Town Court residents, it is helpful to place in perspective the purpose that will be served by such procedures. Obviously, the facility's residents cannot be expected to play a primary role in the decision to decertify. As the dissent points out, the main burden for presenting the case in support of continued certification must rest with the institution itself, since it has the greatest financial interest at stake and is in the better position to adduce relevant facts and to correct violations. Still, the facility's residents have a two-fold, unique interest that should be accommodated by the due process-mandated procedures.

First, the residents have a legitimate claim that they be permitted to supplement any data gathered from other investigative sources regarding the issue whether the facility qualifies under federal and state standards. On the basis of their first-hand experiences the residents can provide relevant information—which cannot be obtained from other sources—concerning the daily functioning of the institution as it affects them.[39]

[39] As the lower court in *Klein* aptly commented,

> While the court is deferential to the expertise of HEW, it is rank paternalism to suggest that patients who live in a facility, who have firsthand knowledge of the conditions, who are best equipped to describe how that facility has served them, cannot contribute to the process by which it is determined whether the facility meets federal standards. The court finds it hard to understand how HEW can seriously argue that the very patients whom HEW seeks to protect can have no purposeful role with respect to the condition of their environment.

Second, the residents should be allowed to bring to light other factors that ought to be weighed before a facility is decertified and its Medicare and Medicaid patients moved elsewhere. The distinction between qualified and unqualified homes is not marked by a bright line. Rather, an institution is decertified when, in the judgment of the federal and state administrators charged with reviewing its performance, it is not in "substantial compliance" with applicable standards and is unlikely to correct its violations.[40] As the Town Court proceedings indicate, a facility may technically be in noncompliance with the standards for a period of years before it is finally decertified.[41] In view of the discretionary nature of a decision to decertify an institution, it seems reasonable to conclude that where the patient transfer that inevitably accompanies decertifications would result in serious hardship or danger to the patients, the administrators probably would be reluctant to decertify the institution and would seek instead to alleviate the nonconforming conditions through alternative sanctions. For instance, if it were brought to the administrators' attention that ten patients were in an intensive care

Klein v. Mathews, 430 F. Supp. 1005 (D.N.J., 1977), *remanded with instructions to dismiss as moot*, No. 77-1896 (3d Cir., Sept. 29, 1978).

[40] 42 U.S.C. §1395cc(b)(2).

[41] Thus, despite various deficiencies, Town Court was able to maintain its status as a qualified facility from the time of its certification in 1967 until October, 1974, because it was still in "substantial compliance" and because it continually submitted plans of correction. Town Court Nursing Center, Inc. v. Beal, No. 77-2221, opinion at 10 (3d Cir., Sept. 29, 1978).

unit recovering from recent heart attacks and that moving them would endanger their lives, the decision-makers might decide to maintain the institution's certification on a temporary basis. The residents are entitled to an opportunity to present factors such as these which affect their right to remain at the qualified institution of their choice.

Besides the usual interests in reducing administrative burdens and other social costs, the government's interests in many ways complement those of the patients. Of prime concern to the government is the patients' well-being.[42] To this end the statutory scheme requires periodic inspections and evaluations of the facility.[43] Also, the patients' welfare necessitates expeditious action to close down facilities with dangerous conditions.

With this assessment of the interests of the patients and the government, the precise process that is due residents of an institution prior to decertification may now be outlined. The interests of the patients and the government can optimally be served by informal and flexibly-structured procedures whose purpose would be to permit the patients to provide relevant information on a decision that will have a major effect on their lives before that decision is made, while not unduly delaying or complicating the administrative process.

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[42] *Cf.* 45 C.F.R. §249.12(a)(1)(ii)(B) (4) (1976) (regulation permits facility to transfer patients only, *inter alia*, "for his welfare or that of other patients.").

[43] 45 C.F.R. §250.23 (1976). The statute limits accreditation of a facility to twelve months, 42 U.S.C. §1395cc(a)(1), thus necessitating annual surveys.

Since the patients are clustered at the facility and the information sought is within their knowledge, their participation could be solicited upon short notice. In fact, the procedure by which data is obtained from them could easily be incorporated into the present apparatus for investigating and surveying the institution.[44] As part of the numerous surveys that are conducted at the institution prior to decertification, the government representatives should therefore assemble the residents of the facility for an informal opportunity to express their views. At such occasion the government representative should explain the contemplated action, the reasons for it, and its potential effect on the patients. Then the patients should be asked to comment. This gathering should be supplemented with individual interviews with those patients who did not attend, since the reasons which prevented them from attending may also justify a determination that they should not be transferred. To ensure the greatest degree of input and to accommodate the needs of the various residents, they should be given the opportunity to present material both orally and in writing, and be offered assistance in formulating their responses.[45]

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[44] 45 C.F.R. §250.23(a)(3)(v) (1976) specifically requires that the medical review team inspection include "personal contact with an observation of each patient receiving assistance under the plan by a team member or members, and review of each such patient's medical record." *See also* text accompanying note 23 *supra* (dissent takes judicial notice of Pennsylvania manual stating that on-site survey "generally involves" interviews with residents).

[45] Allowing the patients this flexibility in choosing among alternative modes of communication appears to be mandated

The fact that many residents are physically or mentally too infirm to take advantage of any procedural machinery that would be established is an inadequate reason for not setting up a mechanism that will meaningfully represent their constitutionally-protected interests. If a patient is too sick to participate, he may be too sick to be transferred, and the investigators should be required to look into that possibility. Also, the needs of these unfortunate individuals can be presented by relatives, friends, or other representatives, who should be notified of such opportunity.

Carefully circumscribed procedures—as previously suggested—for protecting the rights of nursing home residents who receive benefits under the Medicaid program in remaining at the qualified institution of their choice, at least until it has been determined to be unqualified, would appear appropriate. The limited participation afforded by such an arrangement would not unduly impede the government's ability to take decisive and prompt action to ensure the welfare of the patients. It would not constrict the freedom of the other branches of the government by requiring the establishment of bureaucratic machinery or necessitating costly expenditures.

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in light of the Supreme Court's discussion in Mathews v. Eldridge, *see* note 34 *supra*. Many of the elderly patients who reside in nursing homes may share with the welfare claimant in Goldberg v. Kelly the inability to communicate effectively in writing. Others may feel intimidated or embarrassed by their fellow residents' presence at the gathering and prefer not to disclose personal concerns. Still others may be both unable to communicate in writing and unwilling to speak in public, but would be willing to discuss their concerns in private interviews.

Moreover, it would not be required at the annual survey of the facility but only in the infrequent event that decertification of the facility is proposed, since only in that event do the regulations invest the residents with a protectible property right. Finally, it would not clog the courts, because patients who are transferred to a different facility as a result of a procedurally fair determination to decertify the institution at which they resided rarely will have any reason to question the administrative decision in a post-decertification court battle. Nevertheless, granting the patients this limited opportunity to air their concerns sufficiently reduces the risk of an erroneous deprivation of the rights of those who potentially are affected most seriously by the decision to constitute the process that is due them.

CONCLUSION

As often occurs in cases involving constitutional issues, the factual situation presented in Town Court may not be a particularly appealing one for expounding constitutional protections. The nursing home has a history of noncompliance with the governing regulations. It has been subject to a number of extensive investigations and had been afforded opportunities to correct deficiencies before it was finally decertified. Nonetheless, when a court is adjudicating constitutional principles, its view should not be obscured by the fact that one or the other litigant does not measure up to a particular standard. Although the government's decertification decision may eventually be

proven to be correct, that is not the point at issue in the patient's appeal. Rather, we have been asked to address the limited questions whether the governing regulations secure the right to residents of a facility presently qualified under Medicare and Medicaid to be heard before the facility is decertified, and if so, the extent of this right. I believe that in recognizing in the patients a right to participate while carefully limiting its content, an approach has been suggested that both enhances the values of due process and is practical in its application.

SEITZ, *Chief Judge*, dissenting.

Judge Aldisert's opinion relies on the majority opinion filed today in *Klein v. Califano*, No. 77-1896 (September 29, 1978, 3d Cir.). In this dissent, therefore, I primarily address the reasoning in *Klein*, with some reference to the concurring opinion herein.

Klein holds that due process requires that residents of an intermediate health care facility be given an opportunity for a hearing before decertification of that facility. Initially, the *Klein* majority postulates that HEW's regulations grant residents a "property right" not to be transferred without cause. As its minor premise, the majority asserts that an initial administrative decision to decertify an institution is tantamount to an order to transfer. We are to deduce, then, that Medicaid residents are constitutionally entitled to an opportunity to participate in the proceedings that may lead to an initial decertification. I cannot agree either with the majority's premises or with its conclusion.

The majority recognizes, as it must, that due process would place procedural constraints on HEW only if the residents' interests in continued occupancy enjoy the stature of "property." An independent source here the Medicaid law and regulations, must create the "underlying substantive interest" that is to be accorded this stature; federal constitutional law then determines whether that interest "rises to the level of a 'legitimate claim of entitlement' protected by due process." *Memphis Light, Gas & Water Di-*

vision v. Craft, — U.S. —, —, 98 S.Ct. 1554, 1560 (1978).

The majority finds that continued residency in the nursing home of one's choice absent specific cause for transfer is an underlying substantive interest created by three Medicaid provisions. Under the first, 42 U.S.C. §1396a(a) (23), a Medicaid recipient may obtain medical care "from any institution . . . qualified to provide service or services required." Clearly, what the majority characterizes as a recipient's right to obtain medical care from a "freely selected provider" is limited to a choice among institutions which have been determined by the Secretary to be "qualified." Next, the majority's reliance on 45 C.F.R. §205.10(a) (5), ensuring a notice and hearing to a recipient whose benefits are suspended, reduced, discontinued or terminated, is obviously misplaced. As the majority itself notes, the decertification of these facilities did not reduce or suspend the residents' rights to continued benefits.

Finally, the majority relies upon 45 C.F.R. §249.12 (a) (1) (ii) (B) (4),[1] which establishes as one requirement for an institution's certification that each resident admitted to that institution be "transferred or discharged only for medical reasons or for his welfare or that of other patients, or for nonpayment for his stay." The majority reads this provision as a limitation on the Secretary's power to interrupt a recipient's residence at a particular institution. Clearly,

[1] 45 C.F.R. §249 (1976) has been recodified at 42 C.F.R. §449 (1977). In conformity with the majority opinion all citations to that section will be to the earlier codification.

however, this provision is a standard of conduct imposed by the Secretary upon the provider. Violation of this standard is one of many grounds for decertifying the offending institution. *See* 45 C.F.R. §§249.33(a) (2), 249.10(b) (15). The provision creates no "substantive interest" in the residents vis-a-vis the Secretary.

Moving to its minor premise, the majority postulates that a decision to decertify is tantamount to a decision to transfer individual residents. Practically, of course, this may be a consequence in most cases, at least where an institution fails to remedy its insufficiencies. Analytically, however, the two decisions are different. Decertification focuses on the institution's noncompliance with HEW's standards. The majority does not and cannot contend that recipients have a right to remain in an institution that the Secretary has found, by appropriate procedures, to be in substantial noncompliance with the standards. "Transfer trauma," although a legitimate concern for some residents, is necessarily subordinate to the threat posed to all residents by substandard conditions.

Thus, a careful reading of the provisions cited by the majority reveals that neither statutes nor regulations grant the residents of an intermediate health care facility a "substantive interest" in decertification proceedings brought by the Secretary; hence, the residents have no constitutionally protected property right in uninterrupted occupancy.

The concurring opinion in this case concedes that "[t]aken alone, the interest created by each of [these provisions] might be dismissed as not rising to the

level of a cognizable property interest." Nonetheless, we are asked to agglomerate these "three distinct points" into a "landscape of a 'legitimate claim of entitlement.' " Each of the provisions governs an isolated and inapposite aspect of the program's administration. Their effect as a whole, then, cannot be greater than the sum of their parts. Nor is such infirmity rehabilitated by expressions of concern, in which I join, for the welfare of patients generally.

There is nothing harsh or unrealistic about the scope of present statutory and administrative procedures governing decertification. Significantly, a decertification of a non-complying facility does not terminate or otherwise prejudice the rights of the residents to continued Medicaid benefits. Their benefits will be paid so long as they reside in an intermediate health care facility that complies with federal standards. This important fact immediately distinguishes the cases, employed by the majority in *Klein*, in which the individual involved suffered possible direct prejudice to some substantive liberty or property interest.[2]

Furthermore, and of substantial significance, there is resident input in the survey that must precede an initial decertification. We may take judicial notice of a document entitled "Long Term Care Facilities Surveyor's Orientation Manual" published in September 1976 by the Pennsylvania Department of

[2] *Memphis Light, Gas & Water Division v. Craft*, U.S. , 98 S.Ct. 1554 (1978); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Health. On pages III 8-9 of the Manual, in a section entitled "Survey Methodology," the Manual notes that an on-site survey "generally involves" interviews with residents. On page III-7 the Manual suggests that the surveyor at times may have to assume the role of "patient advocate."

A nursing home is not even initially terminated until elaborate proceedings conducted by professionals have resulted in a determination that the institution is not complying substantially with the provisions of its agreement with the Secretary. Here, the survey team consisted of two registered nurses, a dietician, and an equal opportunity development specialist. *See Town Court v. Beal*, No. 77-2221 (filed September 29, 1978, 3d Cir.).

While the Medicaid program itself has been enacted for the benefit of the residents, the survey proceedings are necessarily concerned with the applicable conditions of participation as set forth in the regulations. One should not lose sight of the fact, however, that the ongoing monitoring of participating health care facilities is primarily designed to protect the health and safety of the residents.

In many cases residents would not be in physical or medical condition to participate even minimally in a decertification hearing. Indeed, it is not clear what duties the majority in *Klein* would impose upon the Secretary where senile or incompetent residents are incapable of representing their own interests. Furthermore, since all such facilities must be surveyed annually, it is evident that the majority's position would require that residents be afforded "due pro-

cess" rights in all surveys and, presumably, in judicial review of their sufficiency.

The provider, of course, has a vested interest in "defending" his institution during any survey and so may be expected to adduce the best case for continued certification. Furthermore, he is the one who can correct deficiencies and thus avoid a termination.

Both the law and the facts dictate the conclusion that the mandated initial termination procedures do not deprive these residents of due process.

I would affirm the order of the district court refusing to extend portions of the preliminary injunction (No. 77-2222) and I would reverse the order of the district court continuing in effect part of the preliminary injunction (No. 77-2444).

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 77-2222 and 77-2444

TOWN COURT NURSING CENTER, INC.

and

COOPER, EMMA, CRAWFORD, MARY, KEMP, HAZEL, PHILLIPS, ARNOLD L., TADDEI, DELPHINE, TRUITT, NANCY, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.

v.

BEAL, FRANK S., individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania,

and

CALIFANO, JOSEPH A., JR., individually and in his capacity as Secretary of the United States Department of Health, Education, and Welfare.

EMMA COOPER, MARY CRAWFORD, HAZEL KEMP, ARNOLD L. PHILLIPS, DELPHINE TADDEI, and NANCY TRUITT, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.,

Appellants in No. 77-2222,

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health, Education and Welfare,
Appellant in No. 77-2444.

Before: Seitz, *Chief Judge*, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis, Garth, and Higginbotham, *Circuit Judges*

XVI.

ORDER AMENDING OPINION

It Is Ordered that the printed slip opinion filed September 29, 1978 be amended as follows:

The following paragraph is added on page 32 at the end of the dissenting opinion:

Judge Rosenn and Judge Hunter join this dissent.

Collins J. Seitz
Chief Judge

Dated: October 13, 1978.

SUPREME COURT OF THE UNITED STATES

No. A-555

FRANK BEAL, SECRETARY OF PUBLIC WELFARE, ET AL.,
Petitioners,

v.

TOWN COURT NURSING CENTER, INC., ET AL.

XVII.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner (s).

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 7, 1979.

(s) Wm. J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 18 day of December, 1978.

SUPREME COURT OF THE UNITED STATES

No. A-555

FRANK BEAL, SECRETARY OF PUBLIC WELFARE,

Petitioner,

v.

TOWN COURT NURSING CENTER, INC., ET AL.

XVIII.

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner (s).

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby further extended to and including February 26, 1979.

(s) William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 25 day of January, 1979.